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No. 86-622-CFX  
Status: GRANTED

Title: Eugene Traynor, Petitioner  
v.  
Thomas K. Turnage, Administrator, Veterans'  
Administration and the Veterans Administration

Docketed:  
October 14, 1986

Court: United States Court of Appeals  
for the Second Circuit

Vide:  
86-737

Counsel for petitioner: Brooks, Margaret Kent

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Oct 14 1986	G	Petition for writ of certiorari filed.
3	Nov 18 1986		Order extending time to file response to petition until December 5, 1986.
5	Dec 4 1986		Order extending time to file response to petition until January 4, 1987.
6	Jan 5 1987		Order further extending time to file response to petition until February 3, 1987.
7	Feb 4 1987		DISTRIBUTED. February 20, 1987
8	Feb 4 1987		Order further extending time to file response to petition until February 17, 1987.
9	Feb 17 1987		Brief of respondent Turnage, Admin., VA, etc. in opposition filed. VIDED.
10	Feb 18 1987		REDISTRIBUTED. March 6, 1987
12	Mar 9 1987		Petition GRANTED. The case is consolidated with 86-737, and a total of one hour is allotted for oral argument. Justice Scalia OUT. *****
14	Mar 13 1987		Order extending time to file brief of petitioner on the merits until May 14, 1987.
15	Apr 15 1987		Order further extending time to file brief of petitioner on the merits until May 28, 1987.
16	May 9 1987		Record filed.
17	May 9 1987		Certified copy of original record and proceedings received.
18	May 28 1987		Brief amicus curiae of Vietnam Veterans of America filed. VIDED.
19	May 28 1987	N	Motion of American Medical Assn., et al. for leave to file a brief as amici curiae filed.
20	May 28 1987		Brief amicus curiae of Natl. Council on Alcoholism filed. VIDED.
21	May 28 1987		Joint appendix filed. VIDED.
23	May 28 1987		Brief of petitioner Eugene Traynor filed. VIDED.
30	May 28 1987		Brief amici curiae of American Medical Association, et al. filed.
22	Jun 12 1987	D	Motion of petitioners for divided argument filed.
25	Jun 22 1987		Motion of petitioners for divided argument DENIED. Justice Scalia OUT.
27	Jul 1 1987		Order extending time to file brief of respondent on the merits until July 31, 1987.



Entry	Date	Note	Proceedings and Orders
28	Jul 31 1987		Order further extending time to file brief of respondent on the merits until August 7, 1987.
29	Aug 6 1987		Brief of respondent Turnage, Admin., VA, etc. filed. VIDED.
31	Oct 9 1987		CIRCULATED.
32	Oct 9 1987		SET FOR ARGUMENT. Monday, December 7, 1987. This case is consolidated with case No. 86-737. (4th case) (1 hr)
33	Nov 27 1987	X	Reply brief of petitioner Eugene Traynor filed. VIDED.
34	Dec 7 1987		ARGUED.

**PETITION  
FOR WRIT OF  
CERTIORARI**

86-622①

Supreme Court, U.S.  
FILED

OCT 14 1986

JOSEPH F. SPANIOL, JR.  
CLERK

No.

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1986

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EUGENE TRAYNOR,

*Petitioner,*

vs.

THOMAS K. TURNAGE, Administrator of the Veterans'  
Administration, and the VETERANS' ADMINISTRATION,

*Respondent.*

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**PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

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#### QUESTIONS PRESENTED

1. Whether the federal courts have jurisdiction to review the validity of a Veterans' Administration regulation challenged on the ground that it violates the nondiscrimination mandate of section 504 of the Rehabilitation Act of 1973, when judicial review would be consistent with decisions of the Supreme Court and courts of appeal in several circuits confirming that federal courts have jurisdiction over constitutional and statutory challenges to the validity of the Veterans' law and regulations notwithstanding section 211(a) of the Veterans Benefits Law, and where a refusal to review the challenged regulation would deprive handicapped individuals of any remedy for the violation of rights secured them by an important federal civil rights law.

2. Whether a Veteran's Administration regulation that conclusively classifies "primary" alcoholism as "willfull misconduct", and so bars veterans who have had that condition from receiving extensions of time for using their entitlement to Veterans' education assistance benefits under section 1662(1)(a) of the Veterans Benefits Law, violates section 504 of the Rehabilitation Act of 1973 by discriminating against veterans solely on the basis of their handicap, alcoholism.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

No.

EUGENE TRAYNOR, Petitioner,

v.

THOMAS K. TURNAGE, ADMINISTRATOR  
OF THE VETERANS' ADMINISTRATION,  
AND THE VETERANS' ADMINISTRATION

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PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

---

This petition for certiorari arises out of the Second Circuit's reversal, for lack of jurisdiction, of a judgment of the District Court of the Southern District for New York which declared that a Veterans' Administration regulation (38

C.F.R. § 3.301(c)(2) (1985)) violates section 504 of the Rehabilitation Act of 1973 by discriminating against veterans on the basis of their handicap, a history of alcoholism. The petition is filed on behalf of Eugene Traynor, an honorably discharged veteran who brought this challenge to the Veterans' regulation after he was barred by that regulation from participating in the Veterans' Administration's program of education assistance benefits.

#### OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 791 F.2d 226 and is printed in Appendix A at 1a-38a. The opinion of the District Court is reported at 606 F. Supp. 391 and is printed in Appendix B at 39a-82a. The judgment and order of the District Court

is not reported and is reprinted in Appendix C at 83a-85a.

#### JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on May 16, 1986. A petition for rehearing was denied on July 15, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982).

#### STATUTES AND REGULATIONS INVOLVED

The statutory provisions involved in this case are: three provisions of the Veterans Benefits Law, 38 U.S.C. §§ 211(a), 1662(a)(1), and 4004 (1982 and Supp. II 1984) (set forth in pertinent part in App. H at 122a-126a); sections 7(6), 504 and 505 of the Rehabilitation Act of 1973, 29 U.S.C. §§ 706, 794 and 794a (1982) (set forth in App. I at 127a-

131a); 5 U.S.C. §§ 701 and 702 (1982 and Supp. II 1984), and 28 U.S.C. §§ 1331 and 2201 (1982 and Supp. II 1984) (set forth in App. J at 132a-125a).

The Veterans' Administration regulations involved in this case are 38 C.F.R. §§ 3.1(n) and 3.301(c)(2) (1985); these are set forth in App. K at 136a-138a. Also involved is Administrator's Decision, Veterans' Administration No. 988 (Aug. 13, 1964), which is set forth in App. L at 139a-147a.

#### STATEMENT

This arises out of one veteran's quest, first in the Veterans' Administration and then in the federal courts, to find a forum that will review the validity of a Veterans' Administration ("VA") regulation, 38 C.F.R. § 3.301(c)(2) (1985), whose classification of alcoholism he

sought to challenge on the ground that it violates section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794 (1982), by discriminating against individuals solely on the basis of their handicap. The laws and regulation out of which this challenge arose are described in Section A of this Statement; the history of this case is summarized in Section B (at pp. 15-23).

#### A. The Laws and Regulations At Issue

Since 1970, Congress has recognized that "alcoholism is an illness requiring treatment and rehabilitation", 42 U.S.C. § 4541 (1982), and has sustained a comprehensive federal effort to foster the treatment and enhance the rehabilitation of persons suffering from that illness. See the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Reha-



bilitation Act of 1970, Pub. L. 91-616, 84 Stat. 1848, codified as amended at 42 U.S.C. §§ 4541 et seq. (1982) (the "Comprehensive Alcoholism Act").

In enacting and extending both the Comprehensive Alcoholism Act and the Rehabilitation Act (discussed below), Congress has repeatedly noted that the federal legislative commitment to treat alcoholism as a medical rather than a moral impairment reflects the long-standing consensus of medical and legal authorities about the nature of, and appropriate response to, alcoholism. See, e.g., S. Rep. No. 91-1069, 91st Cong., 2d. Sess. 1, 3 (1970); S. Rep. No. 96-103, 96th Cong., 1st Sess. 3-4, reprinted in 1979 U.S. Code Cong. & Ad. News, 2681, 2682-83 (noting, when enacting and extending the Comprehensive Alcoholism Act, that by 1968 "alcoholism had been recognized as a dis-

ease by the World Health Organization, the American Medical Association, the American Hospital Association, and the American Psychiatric Association", as well as by this Court in Powell v. Texas, 392 U.S. 514 (1968). See also 124 Cong. Rec. S15,566-68 (daily ed. Sept. 20, 1978) (remarks of Sen. Williams and Hathaway during consideration of 1978 Rehabilitation Act amendments).

Even so, as Congress has also often noted and deplored, a lingering "social stigma" attaches to alcoholism, and "underlying attitudes of blame" persist toward those who suffer from that illness. S. Rep. No. 96-103, 96th Cong., 1st Sess. 15, reprinted in 1979 U.S. Code Cong. & Ad. News 2681, 2694 (discussing 1979 extension of Comprehensive Alcoholism Act); 124 Cong. Rec. S15,567-69 (1978) (con-

sidering 1978 amendments to Rehabilitation Act, described below).

Consequently, in 1970, Congress began enacting laws explicitly designed to ensure that alcoholics are not only treated, but are treated fairly. It first addressed the problem of discrimination against alcoholics with respect to access to medical care. See 42 U.S.C. § 290dd-2 (1982 & Supp. II 1984); 38 U.S.C. §4133 (1982).

Then, in 1973, Congress enacted the first federal civil rights law protecting individuals from discrimination on the basis of handicap: Title V of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791-794a (1982) ("the Act"). Section 504 of the Act provides that "no otherwise qualified handicapped individual...shall, solely by reason of his handicap, be excluded from the participa-

tion in, be denied the benefits of, or be subjected to discrimination under any program or activity" covered by the law. 29 U.S.C. § 794.

Persons with conditions or histories of alcoholism were, and are, among the "handicapped individuals" whom Congress intended section 504 to protect from discrimination with respect to benefits, services and jobs for which they are qualified. See 29 U.S.C. § 706(7) (1982). That alcoholism itself is among the "mental or physical impairments" that constitute handicaps for purposes of section 504 was confirmed in 1977 by the United States Attorney General, see 43 Op. Att'y Gen. 12 (1977); confirmed again in 1977 and 1978 by the Department of Health, Education and Welfare, the agency which was given the responsibility for establishing government-wide standards



for implementing section 504, see 45 C.F.R. § 85.31 (1985), 43 Fed. Reg. 2132, 2134 (1978), and 42 Fed. Reg. 22,676, 22,686 (1977); and reconfirmed in 1978 by Congress itself.

In 1978, Congress amended the Act's definition of "handicapped individual" in order to clarify section 504's coverage of current and former alcoholics in the context of employment, and in the course of doing so explicitly reaffirmed the Act's protection of persons with conditions or histories of alcoholism in contexts other than employment. See the Rehabilitation, Comprehensive Services and Developmental Disabilities Amendments of 1978, Pub. L. 95-602, § 122(a)(6), 92 Stat. 2984-85 (1978) ("1978 Rehabilitation Act Amendments"), codified at 29 U.S.C. § 706(7)(B) (1982). In the debates leading up to that amendment, members of Congress

noted once again the "ample evidence that...alcoholics are subject to discrimination in access to benefits, services and employment", and emphasized what the Attorney's General's opinion and regulations implementing section 504 made clear: that "alcoholism alone may not be the sole basis for discrimination." 124 Cong. Rec. S15,569 (1978).

Also, and for the first time, in 1978 Congress extended section 504's prohibition against discrimination based on handicap to all federal agencies, including the Veterans' Administration. 1978 Rehabilitation Act Amendments, Pub. L. 95-602, § 119(2), 92 Stat. 2982 (1978), codified at 29 U.S.C. § 794 (1982). It simultaneously added section 505 to the Rehabilitation Act, clarifying the remedies available to persons aggrieved by the act or failure to act of any federal

agency subject to the nondiscrimination mandate of the law. Id., Pub. L. 95-602, § 120, 92 Stat. 2982-83 (1978), codified at 29 U.S.C. § 794a.

Despite these federal legislative developments respecting alcoholism and discrimination, the Veterans Administration has not changed a longstanding VA regulation and underlying interpretation concerning alcoholism and "willful misconduct." The Veterans' Benefits Law limits eligibility for certain disability-related benefits to those disabilities which are not the result of a veterans' own "willful misconduct", but does not itself define that term. The VA regulations do, however, define it in general as meaning "an act involving conscious wrongdoing or known prohibited action (malum in se or malum prohibitum)". 38 C.F.R. §3.1(n) (1985).

Alcoholism, however, is selected out for special treatment. Since 1964, the VA has made a distinction between alcoholism as a "primary" condition (defined as alcoholism which does not result from an underlying psychiatric disorder), and alcoholism as a secondary condition. The VA conclusively classifies "primary" alcoholism as a "willful misconduct" condition. See 38 C.F.R. § 3.301(c)(2) (1985) and Veterans' Administrator's Decision No. 988 (Aug. 13, 1964).

The classification of "primary" alcoholism as "willful misconduct" set forth in 38 C.F.R. § 3.301(c)(2) governs all determinations made by the Veterans' Administration with respect to veterans' applications for extensions of time, under 38 U.S.C. § 1662(a)(1) (1982 and Supp. II 1984), for using the educational assistance benefits to which they are entitled

under Chapter 34 of the Veterans' law, 38 U.S.C. § 1651 et seq. (1982 and Supp. II 1984).

Chapter 34 provides educational assistance benefits to honorably discharged veterans who have served a certain time in active duty, see 38 U.S.C. § 1661 (1982 and Supp. II 1984). The law requires that such benefits be used within ten years of a veteran's discharge from the armed services, with one exception. 38 U.S.C. § 1662(a)(1) (1982 and Supp. II 1984). (See App. H at 123a for the version of this provision that was in effect at all times relevant to this action.) In 1977, Congress amended section 1662(a)(1) to require the VA to grant an extension of time to any veteran entitled to educational benefits who was prevented from pursuing his education during his original limitations period "because of a physical

or mental disability which was not the result of [the] veterans' own willful misconduct." Id. See the G.I. Bill Improvement Act of 1977, Pub. L. 95-202, Title II, § 203(a)(1), 91 Stat. 1439 (1977).

Since the VA's alcoholism regulation conclusively treats "primary" alcoholism as "willful misconduct" per se, it automatically forecloses all veterans classified as having had that condition from receiving any extension of time under section 1662(a)(1). Eugene Traynor was one such veteran.

#### B. Summary of Proceedings

Eugene Traynor is a veteran who suffered from alcoholism over approximately a fifteen year period ending in 1974. His condition progressively worsened following his honorable discharge from the Army in

1969. He was diagnosed as having "primary" alcoholism (as that term is used by the VA, without a diagnosis of an underlying psychiatric disorder) during repeated hospitalizations for that and related illnesses between 1970 and 1974. He was able to overcome his alcoholism following his last hospitalization in 1974, and has remained sober since.

In 1977 he began attending college with the aid of Veterans' educational assistance benefits. Although entitled to 24 months of those benefits based on his military service, he had used only nine and one-half months of his entitlement by August 1979, when the tenth anniversary of his discharge arrived and his benefits were terminated. He applied for an extension of time to use the remaining benefits in his entitlement under 38 U.S.C. § 1662(a)(1); but, because "pri-

mary" alcoholism is equated with "willful misconduct" under 38 C.F.R. § 3.301(c)(2), the VA barred him from receiving any extension of his limitation period (App. E at 88a-89a).

In his appeal to the Board of Veterans' Appeals ("Board"), Mr. Traynor challenged the VA regulation and its inevitable outcome in his case as being "wrong in fact and in law". He pointed out the incompatibility between the VA's concept of alcoholism as willful misconduct and the recognition, by medical authorities and in other federal laws and agencies, of alcoholism as an illness to be treated rather than conduct to be condemned (App. M at 148a-149a).

In his hearings before the Board, Mr. Traynor also explicitly contended that the VA alcoholism regulation was forbidden by the nondiscrimination mandate of the



Rehabilitation Act and violated the Constitution (App. M at 148a-149a). The Board's response was reflected in the statement of one of its members during the hearing: "[Y]ou're asking us...to judge the regulation, to act as a court and you're asking us to do a few things that we are incompetent to do. To be under -- I don't mean incompetent, we just don't have-- we're incompetent in that jurisdiction." (App. A at 35a-36a.)

The Board of Veterans' Appeals denied his appeal (App. F at 90a-102a) and denied it again on reconsideration (App. G at 103a-121a). While the Board noted that Mr. Traynor had challenged the validity of the alcoholism regulation under the Constitution and other federal statutes, it concluded that it was "bound in its decisions not only by instructions of the Administrator of Veterans Affairs but

also by regulations of the Veterans Administration." See App. G at 116a; 38 U.S.C. 4004(c) (1982).

Mr. Traynor then brought this action for declaratory and related relief, invoking the District Court's jurisdiction pursuant to 28 U.S.C. § 1331, 28 U.S.C. §§ 2201 and 2202, 29 U.S.C. § 794a and 28 U.S.C. § 1361. He sought a declaratory judgment that the VA's alcoholism regulation violated section 504 of the Rehabilitation Act, 29 U.S.C. § 794, and the equal protection and due process clauses of the Fifth Amendment to the Constitution.

On cross-motions for summary judgment, the District Court ruled that it had jurisdiction to review Mr. Traynor's constitutional and statutory challenge to the validity of the VA's alcoholism regulation, notwithstanding 38 U.S.C. § 211(a) (App. B at 53a-59a). It then ruled that,

while the challenged regulation withstood constitutional scrutiny (App. 59a-65a), the "VA policy of excluding those with a history of primary alcoholism from consideration for extensions of delimiting dates contravenes the Rehabilitation Act by discriminating against those rehabilitated alcoholics...most deserving of aid" (App. 65a-80a). Consequently, it granted Mr. Traynor's request for a declaratory judgment, declaring that "defendants' regulation set forth in 38 C.F.R. § 3.301(c)(3) violates the Rehabilitation Act, as amended, 29 U.S.C. § 794"; and remanded his application for an extension to the VA for further proceedings consistent with its opinion. (App. C at 83a-84a.

On appeal, a divided panel of the Second Circuit reversed the District Court's jurisdictional ruling on the

ground that 38 U.S.C. § 211(a) precluded judicial review of the the VA's decision denying an extension to Mr. Traynor; the Court of Appeals therefore declined to reach the merits of his Rehabilitation Act challenge to the validity of the VA's alcoholism regulation. (App. A at 1a-25a).

The majority opinion characterized Mr. Traynor's claim as a narrow one involving only his dispute of the reasonableness of the VA's decision to refuse him an extension of his limitations period "based on its interpretation and application of the alcoholism regulation" in his individual case (App. A at 13a). This characterization overlooked the essence of Mr. Traynor's complaint: its attack on the validity of a regulatory classification that he alleged was maintained and applied across the board in violation of the first



federal civil rights law forbidding discrimination based on handicap.

The majority read section 211(a) of the Veterans' law to immunize from judicial review all decisions of the VA on "any question of law or fact", *id.* Moreover, the majority assumed that the principle question raised here -- whether the VA's own regulations complied with other federal laws, in particular, section 504 of the Rehabilitation Act -- was one that the VA both had the authority to and did decide in this case (App. A at 15a).

In dissent Judge Kearse pointed out that, contrary to the majority's truncated reading of the statutory language, by its terms section 211(a) "immunizes from judicial review ...only decisions of the VA on a 'question of law or fact under any law administered by the Veterans' Administration providing benefits for

veterans'", 38 U.S.C. § 211(a) (App. A at 29a). She then concluded for two reasons that § 211(a) does not deprive the federal courts of jurisdiction to review the principal question of law in this case-- whether the challenged VA regulation violates section 504 of the Rehabilitation Act:

First, this question is not one that arises under a law that is administered by the VA or that provides benefits for veterans; rather it arises under the Rehabilitation Act, which does not provide veterans' benefits and is not administered by the VA. Second, the Administrator did not in fact decide this question but rather disclaimed jurisdiction to decide it.

(App. A at 28a-29a.)

### REASONS FOR GRANTING THE WRIT

- I. The Jurisdictional Ruling of the Court of Appeals Conflicts with the Decisions of this Court Concerning the Limitations That 38 U.S.C. § 211(a) Places on Judicial Review, as well as The Decisions of Other Circuits in Similar Cases; Those Conflicts Should Be Resolved.

The Court of Appeals' conclusion that § 211(a) deprives the federal courts of jurisdiction to review the validity of the challenged Veterans' Administration regulation in light of the nondiscrimination mandate of the Rehabilitation Act is based upon a constrictive reading of § 211(a) that is not supported by the specific language or legislative history of § 211(a) or by the reticulated statutory scheme of the Veterans' Benefit Law. It is inconsistent with this Court's seminal analysis of the scope, and limitations, of § 211(a) in Johnson v. Robison, 415 U.S. 361 (1974).

It also conflicts squarely with this Court's most recent decision finding federal question jurisdiction over a challenge to a Medicare regulation in the face of a statute purporting to preclude review, Bowen v. Michigan Academy of Family Physicians, 106 S.Ct. 2133 (1986). The Court there recognized that the Medicare law's preclusion provision, which prohibits judicial review of "determinations ... of ... the amount of benefits" under Part B of the Medicare program, "simply does not speak to challenges mounted against the method by which such amounts are to be determined rather than the determinations themselves". Id., 106 S.Ct. at 2138 (emphasis in original). The Court concluded that "an attack on the validity of a regulation is not the kind of administrative action" which the Medicare law insulates from review. Id.

at 2139. Bowen's result rested on a conscientious analysis of the "no review" provision's language, its legislative history and its place in the legislative scheme, as well as the "strong presumption that Congress intends judicial of review of administrative agency action". Id. at 2135. Had the court below performed the same conscientious analysis here, it would have recognized that the "no-review" provision of § 211(a) does not apply in this case, whose sole purpose was to challenge not the Administrator's decision on an individual application for an extension of benefits, but the ironclad rule equating "primary" alcoholism with "willful misconduct" in the regulation that determined the outcome of Mr. Traynor's and all other similarly handicapped veterans' claims.

Finally, the Court of Appeals' jurisdictional ruling also conflicts with those of courts of appeals in several other circuits involving attacks on VA regulations such as that here. Following the reasoning that led this Court in Johnson, supra, to find § 211(a) no bar to constitutional challenges to provisions of the Veterans' law, those courts did not hesitate to take jurisdiction over constitutional and statutory challenges to VA regulations and to the authority of the Administrator to promulgate regulations.<sup>1</sup> This conflict calls out for a uniform and authoritative resolution.

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<sup>1</sup> See, e.g., Tinch v. Walters, 573 F.Supp. 346 (E.D. Tenn. 1983), aff'd, 765 F.2d 599 (6th Cir. 1985); Evergreen State College v. Cleland, 621 F.2d 1002 (9th Cir. 1980); University of Maryland v. Cleland, 621 F.2d 98 (4th Cir. 1980); Merged Area X (Education) v. Cleland, 604 F.2d 1075 (8th Cir. 1979); Wayne State University v. Cleland, 590 F.2d 627 (6th Cir. 1978).



II. This Case Also Raises Important Questions About the Validity of 38 C.F.R. §3.301(c)(2) Under the Rehabilitation Act of 1973.

This case also presents important questions concerning the validity of the Veterans' Administration alcoholism regulation under the first federal civil rights law forbidding discrimination solely on the basis of handicap by federal agencies. Those questions were not reached by the court below, though they were reached by the District Court, which ruled that the regulation that "defines primary alcoholism as willful misconduct per se ...contravenes the Rehabilitation Act by discriminating against those rehabilitated alcoholics (a remarkable achievement) most deserving of aid" (App. B, 76a-80a).

This Court has held that the essence of section 504 of the Rehabilitation Act lies in its assurance of "evenhanded treatment" for the handicapped individuals

within its scope, Alexander v. Choate, 105 S.Ct. 712, 722 (1985), and has affirmed the importance of the law's remedies, Consolidated Rail Corporation v. Darrone, 465 U.S. 624 (1984).

Courts of appeals in three circuits have not just divided but splintered on both the jurisdictional issues and the merits of the Rehabilitation Act claims raised in this and two other virtually identical cases, all of which were decided identically in favor of the veterans by the District Courts.<sup>2</sup> Therefore, there exists a conflict among the circuits on the issue whether the Rehabilitation Act's

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<sup>2</sup> See McKelvey v. Walters, 596 F.Supp. 1317 (D.D.C. 1984), rev'd sub nom. McKelvey v. Turnage, 792 F.2d 194 (1986) (taking jurisdiction on a sui generis basis, and rejecting Rehabilitation act claim); Tinch v. Walters, 573 F. Supp. 346 (E.D. Tenn. 1983), aff'd, 765 F.2d 599 (6th Cir. 1985) (affirming lower court's ruling that the VA alcoholism regulation contravenes section 504).

nondiscrimination mandate forbids the regulation challenged here, and this Court should reach this issue. The inconsistent rights and remedies created by this conflict warrant clarification by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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Attorneys for Petitioner

October 1986

## APPENDIX



APPENDIX A

Opinion and Judgment of the United States  
Court of Appeals, Second Circuit,  
Entered May 16, 1986

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

\_\_\_\_\_\*\_\_\_\_

No. 422 -- August Term 1985

Argued: November 12, 1985

Decided: May 16, 1986

Docket No. 85-6208

\_\_\_\_\_\*\_\_\_\_

EUGENE TRAYNOR,

Plaintiff-Appellee,

-against-

HARRY W. WALTERS, ADMINISTRATOR OF  
THE VETERANS ADMINISTRATION,

Defendants-Appellants.

\_\_\_\_\_\*\_\_\_\_

BEVERLY SHERMAN NASH, Asst. U.S. Atty.  
for S.D.N.Y. (Rudolph W. Giuliani,  
U.S. Atty. for S.D.N.Y., Jane E.  
Booth, Asst. for S.D.N.Y., of  
Counsel), for defendants-appel-  
lants.

CATHERINE HART O'NEILL, New York City,  
(Margaret K. Brooks, Legal Action  
Center of the City of New York,  
Inc., New York City, of Counsel),  
for plaintiff-appellee.

BEFORE TIMBERS, KEARSE, PRATT, CIRCUIT  
JUDGES.

\*  
\_\_\_\_\_

GEORGE C. PRATT, Circuit Judge:

Defendants, the Veterans' Administra-  
tion ("VA") and the VA administrator,  
raise two questions on appeal: (1) Did  
the district court have jurisdiction to

review the VA's denial of plaintiff Tray-  
nor's claim for extension of his period  
of eligibility for veterans' educational  
benefits? (2) Does VA regulation 38 C.F.R.  
§3.301(c)(2), which, as interpreted and  
applied by the VA, treats primary alco-  
holism as "willful misconduct" barring  
extension of the period of eligibility  
for veterans' educational benefits, vio-  
late section 504 of the Rehabilitation  
Act of 1973, as amended, 29 U.S.C. §794?  
The district court answered both questions  
affirmatively. 606 F.Supp. 391. Since  
we hold on the first question that the  
district court lacked jurisdiction to  
review the VA's denial of Traynor's claim,  
we do not reach the second question.

#### BACKGROUND

Plaintiff Eugene Traynor, a 44 year old  
veteran of the United States Army, suf-  
fered from alcoholism over approximately

a fifteen year period ending in 1974. During that time, he served on active duty in the army for an 18-month period ending on August 27, 1969, when he was honorably discharged. Since February 1974, when he began to attend Alcoholics Anonymous meetings daily, Traynor has apparently not had a drink.

When Traynor entered college in 1977, he applied for and received veterans' education assistance benefits. Although entitled to 24 months of those benefits based upon his military service, he had used only nine and one-half months of benefits when they were terminated on August 27, 1979.

Traynor's benefits were terminated pursuant to 38 U.S.C. §1662(a)(1), which, with one exception, limits a veteran's educational assistance to a period of ten years beginning with his discharge from

the service. Under the exception, however, a veteran will be granted an extension of his eligibility period if he was prevented from pursuing his educational program due to a physical or mental disability "which was not the result of such veteran's own willful misconduct". 38 U.S.C. §1662(a)(1).

VA regulations implicitly provide that alcoholism may be considered willful misconduct:

(2) Alcoholism. The simple drinking of alcoholic beverage is not of itself willful misconduct. The deliberate drinking of a known poisonous substance or under conditions which would raise a presumption to that effect will be considered willful misconduct. \* \* \* Organic diseases and disabilities which are a secondary result of the chronic use of alcohol as a beverage, whether

out of compulsion or otherwise, will not be considered of willful misconduct origin.

38 C.F.R. §3.301(c)(2).

In practice, the VA interprets this regulation to provide a distinction between "primary" alcoholism, which does not result from an underlying psychiatric disorder, and "secondary" alcoholism, which does result from such a disorder. The former is presumptively considered to be willful misconduct, while the latter is not.

Traynor applied to the VA for an extension of his benefit period on the ground that his alcoholism had prevented him from pursuing his education until he first applied to college. The VA denied his claim, stating in part that his "periods of hospitalization because of alcoholism are not

for consideration, since they are a result of the veteran's own willful misconduct."

Plaintiff appealed the VA's decision to the Board of Veterans Appeals ("board"), contending that the VA's presumptive characterization of his primary alcoholism as "willful misconduct" was "wrong in fact and in law". After a hearing, the board affirmed the initial decision, and on reconsideration, confirmed its own determination.

Having exhausted his administrative remedies, Traynor filed this action in the district court seeking monetary and injunctive relief as well as a declaratory judgment that as interpreted and applied the regulation violated the Rehabilitation Act of 1973 and the fifth amendment to the United States Constitution. The district court held (1) that it had jurisdiction over the action, and (2) that while the



regulation withstood constitutional scrutiny, it violated the Rehabilitation Act's prohibition against discrimination based on an individual's handicap, 29 U.S.C. §794. The district court therefore remanded Traynor's application for an extension of time to the VA. The VA and the VA administrator appealed.

#### DISCUSSION

The VA asserts that 38 U.S.C. §211(a) bars any judicial review of the board's decision and deprives this court of jurisdiction over the statutory issues presented. Section 211(a) provides, in relevant part, that:

the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans \* \* \* shall be final and conclusive and no other official or

court of the United States shall have power or jurisdiction to review any such decision \* \* \* .

The VA interprets this section broadly to preclude judicial review of all nonconstitutional challenges relating to its decisions on benefits. See Walters v. National Association of Radiation Survivors, 105 S.Ct. 3180, 3182 (1985) ("[j]udicial review of VA decisions is precluded by statute"); Pappanikoloaou v. Administrator of the Veterans Administration, 762 F.2d 8, 9 (2d Cir.) ("[o]ne may not circumvent §211(a) by seeking damages on a constitutional claim arising out of a denial of benefits"), cert. denied, \_\_\_ U.S. \_\_\_, 106 S.Ct. 150 (1985); accord Rosen v. Walters, 719 F.2d 1422, 1424-25 (9th Cir. 1983); Anderson v. Veterans Administration, 559 F.2d 935, 936 (5th Cir. 1977); Ross v. United States, 462 F.2d 618, 619

(9th Cir.), cert. denied, 409 U.S. 984 (1972); Milliken v. Gleason, 332 F.2d 122, 123 (1st Cir. 1964), cert. denied, 379 U.S. 1002 (1965).

Relying primarily on Johnson v. Robison, 415 U.S. 361, 94 S.Ct. 1160, 39 L.Ed.2d 389 (1974), Traynor contends that the jurisdictional limitation of section 211(a) should be interpreted narrowly in light of a basic presumption that judicial review is available absent clear and convincing evidence of congressional intent to the contrary. Id. at 373-74, 94 S.Ct. at 1168-9. In Johnson, the Supreme Court held that judicial review of the constitutionality of veterans' benefits regulations was not barred by section 211(a), id. at 361, 94 S.Ct. at 1160, and supported its conclusion with four reasons, id. at 366-68, 94 S.Ct. at 1165-66. First, construing section 211(a)

to bar judicial review of constitutional claims would raise serious questions concerning the section's own constitutionality. Second, no explicit provision of section 211(a) bars judicial consideration of a veteran's constitutional claim. Third, the Court's construction of section 211(a) was supported by the VA's administrative practice, since the VA had previously expressly disclaimed authority to decide constitutional claims.

Fourth, the legislative history of section 211(a) did not demonstrate a congressional intent to bar judicial review of constitutional questions. Rather, that history revealed two primary purposes for the section: "(1) to insure that veterans' benefits claims will not burden the courts and the Veterans' Administration with expensive and time-consuming litigation, and, (2) to insure that the



technical and complex determinations and applications of Veterans' Administration policy connected with veterans' benefits decisions will be adequately and uniformly made." Id. at 370, 94 S.Ct. at 1167 (footnotes omitted). According to the Johnson Court, neither of these purposes would be thwarted by giving the courts jurisdiction to review constitutional challenges to veterans' benefits decisions. Faced with these factors, the Court found, as to constitutional issues, an absence of "clear and convincing" evidence to overcome the presumption in favor of judicial review. Id. at 373-74, 94 S.Ct. at 1168-69.

Plaintiff seeks to extend Johnson to authorize statutory as well as constitutional challenges of VA decisions. His attempt, however, is misguided because, when viewed against the factors outlined

by the Johnson Court, the circumstances in this case present "clear and convincing evidence" in favor of precluding judicial review of the VA's regulation and its application, in light of the Rehabilitation Act, to Traynor's alcoholism.

First, unlike the constitutional issue in Johnson, there is no inherent constitutional problem involved in congress's denying judicial review to the VA's refusal of an extension to plaintiff based on its interpretation and application of the alcoholism regulation. See Gott v. Walters, 756 F.2d 902, 912 n. 10 (D.C. Cir. 1985), vacated en banc, 791 F.2d 172 (1985). The problem was simply one of applying the statute, through regulation and factfinding, to Traynor's particular case.

Second, while section 211(a) makes no reference to constitutional issues, it

does purport to immunize from judicial review all decisions of the VA "on any question of law or fact", a phrase patently broad enough to encompass plaintiff's argument that the alcoholism regulation was unreasonably applied to his situation. In Briscoe v. Bell, 432 U.S. 404, 97 S.Ct. 2428, 53 L.Ed.2d 439 (1977), the Court was faced with a similar question where a statute provided that determinations by census officials that a state was covered by the Voting Rights Act of 1965 "shall not be reviewable in any court". Id. at 407-08, 97 S.Ct. at 2430. The Court noted that such language "could hardly prohibit judicial review in more explicit terms", id. at 409, 97 S.Ct. at 2431, even though the question involved was a "pure[ly] legal" determination as to whether the federal officials

had acted in excess of their statutory authority, id. at 408, 97 S.Ct. at 2430.

Third, while the VA has expressly disclaimed authority to review constitutional issues such as were involved in Johnson, it has never disclaimed its authority to determine whether its own regulations comply with federal statutes or whether they are properly applied to a particular case.

Finally, the available legislative history does point toward an intent by congress to bar judicial review of individual veteran's claims, such as this one, so as to avoid overburdening the federal courts and to preserve the VA's control over "the technical and complex determinations and applications of Veterans' Administration policy", id. 415 U.S. at 370, 94 S.Ct. at 1167, that congress has entrusted to it.

Given this clear congressional intent to bar judicial review of veterans' benefit claims, see H.R. Rep. No. 1166, 91st Cong. 2d Sess., reprinted in 1970 U.S. Code Cong. & Ad. News 3723, 3729-31, the concerns expressed in the dissent do not compel a different result. Arguing that section 504 is not administered by the VA, the dissent would, in effect, create a pocket of veterans -- those handicapped within the meaning of section 504 -- for whom judicial review of benefit claims would be available despite section 211(a). It is undoubtedly true, as a practical matter, that many veterans have in the service of our country suffered injuries that qualify them as "handicapped individual[s]" for purposes of section 504. See 29 U.S.C. §706(7). Despite this obvious reality, however, congress did not delineate any exception to section 211(a) for

"handicapped" veterans when it passed section 504. Such congressional silence argues against any intent to grant to "handicapped" veterans the judicial review traditionally denied all other veterans. Far more likely, congress intended the VA to comply with section 504 when reaching a benefit determination for a veteran who is handicapped. In other words, as applied to veterans' benefits congress intended section 504 to be part of the "law administered by the Veterans' Administration providing benefits for veterans". 38 U.S.C. §211(a).

We recognize that some of the circuit courts disagree with our conclusion and have held that, under Johnson, section 211(a) does not divest federal courts of jurisdiction over challenges to the VA's authority to promulgate regulations. See, e.g., Evergreen State College v. Cleland,

621 F.2d 1002, 1008 (9th Cir. 1980); University of Maryland v. Cleland, 621 F.2d 98, 100-01 (4th Cir. 1980); Merged Area X (Education) v. Cleland, 604 F.2d 1075, 1077-78 (8th Cir. 1979); Wayne State University v. Cleland, 590 F.2d 627, 631-32 (6th Cir. 1978). However, we do not regard these cases as controlling here.

We first note that these cases arose in a significantly different context from that of the instant case. They did not involve denials of benefits to particular veterans, but instead were broad challenges to the validity of a VA regulation brought by educational institutions interested in the overall administration of the VA educational benefits program. Second, three of the four cases gave no independent explanation for upholding federal court jurisdiction, but instead

simply relied on the fourth case, Wayne State.

We also question the rationale behind these holdings. In determining that federal courts had jurisdiction over the challenges there presented, they placed primary reliance on only the fourth factor supporting the Supreme Court's decision in Johnson, concluding that allowing the courts to assert jurisdiction over such nonconstitutional claims would not overburden courts with expensive and time-consuming litigation nor would it involve them in technical and complex determinations better left to the VA in the interests of uniformity.

In fairness, the court in Wayne State did assert that (1) the legislative history of section 211(a) did not support the conclusion that congress intended to preclude judicial review of the VA's author-



ity to promulgate regulations, and (2) that such a construction would raise serious doubts about the statute's constitutionality. 590 F.2d at 631-32. But we do not find these arguments convincing. First, our review of the legislative history cited by the court provides no clear support either in favor of or against such a construction, and second, as already indicated, we perceive no doubts about the statute's constitutionality arising from a construction that would permit the VA alone to determine whether its regulations carried out the intent of congress's enabling act. See Briscoe v. Bell, 432 U.S. 404, 408, 413-14, 97 S.Ct. 2428, 2430, 2433-34, 53 L.Ed.2d 439 (1977) (Supreme Court vacated decision of the court of appeals that found that "even where the intent of Congress was to preclude judicial review,

a limited jurisdiction exists in the court to review actions which on their face are plainly in excess of statutory authority").

Moreover, Wayne State and the cases that have relied on it suffer from a fundamental weakness: they ignore the unambiguous language of section 211(a) itself. In most of the cases in which the Supreme Court has faced the question as to whether there was "clear and convincing" evidence of a congressional intent to bar judicial review of an administrative decision made under the authority of a statute, the language of the statute has lacked any expression of a clear intent to bar such judicial review. See, e.g., Dunlop v. Bachowski, 421 U.S. 560, 566, 95 S.Ct. 1851, 1857, 44 L.Ed.2d 377 (1975) (statute "contains no provision that explicitly prohibits

judicial review" of the decision of the administrator); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410, 91 S.Ct. 814, 820, 28 L.Ed.2d 136 (1971) ("no indication that Congress sought to prohibit judicial review"); Abbott Laboratories v. Gardner, 387 U.S. 136, 141, 87 S.Ct. 1507, 1511, 18 L.Ed.2d 681 (1967) ("no explicit statutory authority for its argument that pre-enforcement review is unavailable"); cf. Brownell v. We Shung, 352 U.S. 180, 184-85, 77 S.Ct. 252, 255-6, 1 L.Ed.2d 225 (1956) (where statute provided that "decision of the Attorney General shall be final", such decision subject to review under only certain circumstances). By contrast, we think that the language of section 211(a) itself provides clear and convincing evidence of congressional intent to bar

judicial review of the type of claim raised by Traynor.

For similar reasons, we are not persuaded by those few courts, McKelvey v. Walters, 596 F.Supp. 1317 (D.D.C. 1984), appeal filed, Docket No. 84-5910 (D.C. Cir. December 10, 1984); and Tinch v. Walters, 573 F.Supp. 346 (E.D. Tenn. 1983), aff'd, 765 F.2d 599 (6th Cir. 1985), that have relied on Johnson as a basis for exercising jurisdiction over the precise statutory claim raised by Traynor here. McKelvey's holding was premised on the rationale of Wayne State, 596 F.Supp. at 1320-21, which in our view is defective for the reasons already stated. In Tinch, the district court properly found jurisdiction to consider the plaintiff's constitutional claims, 573 F.Supp. at 347, but, after finding the constitutional claims meritless, the

court proceeded for no explained reason to decide the statutory claim as well, id. at 348-49, and on appeal the sixth circuit affirmed without discussion of the jurisdictional problem, 765 F.2d at 601-04. Of course, since jurisdiction over meritless constitutional claims would not provide the court with jurisdiction over a statutory claim otherwise beyond its reviewing powers, Tinch stands on shaky ground, and we decline this opportunity to follow its lead.

#### CONCLUSION

We conclude that 38 U.S.C. §211(a) provides clear and convincing evidence of a congressional intent to bar judicial review of the type of claim raised by Traynor and that his complaint must therefore be dismissed. This conclusion makes it unnecessary, of course, to review Traynor's claim that the VA regulation on

alcoholism violated section 504 of the Rehabilitation Act.

Reversed and remanded to the district court with a direction to dismiss the complaint for lack of jurisdiction.

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KEARSE, Circuit Judge, dissenting:

I must respectfully dissent from the majority's ruling that the district court lacked jurisdiction to consider whether the regulations of the Veterans' Administration ("VA" or "Administrator") challenged by plaintiff Eugene Traynor violate §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (1982 & Supp. I 1983). For the reasons below, I would conclude that the court had jurisdiction to consider that claim.

Two areas of substantive law are involved in the claim that is principally at

issue on this appeal. One, set out in 38 U.S.C. §1662(a)(1) (1982 & Supp. I 1983) and a combination of VA regulations ("VA alcoholism regulations") found in 38 C.F.R. §3.1(n) (1985), id. §3.301(c)(2), and Administrator's Decision No. 988 (Aug. 13, 1964), governs the circumstances in which a veteran who at one time was disabled by alcoholism may be provided educational benefits for a period that extends beyond the tenth anniversary of his discharge from the armed services. The other, §504 of the Rehabilitation Act, forbids the withholding of benefits in, inter alia, a program conducted by a federal agency such as the VA, to "otherwise qualified" handicapped individuals solely by reason of their handicaps.

Two jurisdictional statutes are at issue. First, the Administrative Procedure Act, 5 U.S.C. §§ 701 et seq. (1982

& Supp. II 1984), gives the federal court jurisdiction to hear the claims of a "person suffering legal wrong ... or adversely affected or aggrieved by [final or otherwise reviewable] agency action ... within the meaning of a relevant statute," id. §702, so long as there are no "statutes preclude[ing] judicial review," id. §701(a)(1). The other jurisdictional statute is 38 U.S.C. §211(a) (1982), which the majority concludes is a statute precluding judicial review of the claim that the challenged VA regulations violate §504 of the Rehabilitation Act. I disagree with this conclusion.

Section 211(a) provides, in pertinent part, that

the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for



veterans ... shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision....

38 U.S.C. §211(a). The principal question of law presented here is whether the VA alcoholism regulations denying so-called "primary" alcoholics extended educational benefits violate § 504 of the Rehabilitation Act. For two reasons I conclude that §211(a) does not deprive the courts of jurisdiction to entertain this question. First, this question is not one that arises under a law that is administered by the VA or that provides benefits for veterans; rather it arises under the Rehabilitation Act, which does not provide veterans' benefits and is not administered by the VA. Second, the Administrator did not in fact decide this question but

rather disclaimed jurisdiction to decide it.

In construing §211(a) as depriving the court of jurisdiction to entertain Traynor's challenge to the VA alcoholism regulations as violative of the Rehabilitation Act, the majority apparently focuses only on the statutory phrase "on any question of law or fact" and ignores its ensuing modifier. By its terms, however, the section immunizes from judicial review not all "decisions of the VA 'on any question of law or fact,'" see Majority Opinion ante at 229, but only decisions of the VA on a "question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans," 38 U.S.C. §211(a) (emphasis added). Thus, as I read §211(a), it deprives the courts of jurisdiction to review the Administrator's rulings of law

only if they were made under a law that (a) is administered by the VA and (b) provides benefits for veterans.

At the outset of Traynor's quest for an extended period of educational benefits there were, of course, many questions before the VA: (1) whether Traynor had been disabled by reason of his alcoholism; (2) whether that alcoholism was "primary" within the meaning of the VA regulations; (3) whether such primary alcoholism constituted "willful" misconduct within the meaning of the VA regulations; and (4) assuming affirmative answers to the first three questions, whether it is permissible under the Rehabilitation Act for the VA regulations to deny the requested educational benefits to those classified under VA regulations as primary alcoholics. The first three of these questions plainly were questions of fact or law arising

under the laws that are administered by the VA and that provide benefits for veterans; as to those questions, §211(a) denies the court jurisdiction to review the Administrator's decision.

The last question, however, called for a decision under the Rehabilitation Act. "A decision of law or fact 'under' a statute is made by the Administrator in the interpretation or application of a particular provision of the statute to a particular set of facts." Johnson v. Robison, 415 U.S. 361, 367, 94 S.Ct. 1160, 1166, 39 L.Ed.2d 389 (1974). Traynor's Rehabilitation Act challenge involved the facts (1) that 38 U.S.C. §1662(a)(1) denies extended educational benefits to a veteran whose disability resulted from his own willful misconduct, and (2) that the VA alcoholism regulations provide that primary alcoholism is willful

misconduct and that primary alcoholics are ipso facto to be denied extended educational benefits. The challenge required a decision as to whether the Rehabilitation Act prohibits this combination of facts -- i.e., a decision under the Rehabilitation Act.

The Rehabilitation Act does not provide benefits to veterans. Nor is it administered by the VA. The majority appears to dispute this, but in so doing it confuses administration with compliance. The fact that the VA is itself required to comply with a statute that governs its operations does not mean that it administers that statute. The VA is also required to comply with the Constitution; it does not thereby "administer" the Constitution. In fact the agency responsible for administering the Rehabilitation Act is HHS. In 1976, the Department of

Health, Education, and Welfare (now HHS) was designated the leading agency to promulgate regulations implementing §504; other federal agencies were directed to make their rules, regulations, and directives consistent with the standards and procedures established by HHS. See Exec. Order No. 11,914, 3 C.F.R. 117 (1977) ("The Secretary [of HHS] shall establish standards for determining who are handicapped individuals and guidelines for determining what are discriminatory practices, within the meaning of section 504."). Thus, a decision by the Administrator as to whether VA regulations violate the Rehabilitation Act -- i.e., a decision under a law that does not provide veterans' benefits and is not administered by the VA -- is not within the category of decisions that §211(a) places beyond judicial review.

Further, it appears to me that the Administrator has declined even to render a decision on the question of whether the VA alcoholism regulations violate the Rehabilitation Act. The majority's statement that "the VA ... has never disclaimed its authority to determine whether its own regulations comply with federal statutes," Majority Opinion ante at 229, is belied by the record. In Traynor's appeal to the Board of Veterans Appeals ("Board"), he explicitly contended that the VA alcoholism regulations were forbidden by the Rehabilitation Act. In denying Traynor's claim on reconsideration, the Board noted that Traynor had challenged the validity of the regulations under the Constitution, under 38 U.S.C. §1662, and under other statutes. The Board concluded, however (consistent with 38 U.S.C. §4004(c) (1982)), that it was "bound in its de-

cisions not only by instructions of the Administrator of Veterans Affairs but also by the regulations of the Veterans Administration." This amounted to a disclaimer of authority to determine whether the VA alcoholism regulations violated other federal laws, a disclaimer also made several times in the colloquy at the Board hearing on Traynor's request for reconsideration of the denial of his claim, which included the following statement by a member of the Board to Traynor's counsel:

You've made a very eloquent argument and -- but you're asking us right now, in certain respects, to judge the regulations, to act as a court and you're asking us to do a few things that we are incompetent to do. To be under-- I don't mean incompetent, we just



don't have -- we're incompetent in that jurisdiction.

The Board's decision is the final decision of the Administrator, see 38 U.S.C. §§ 4004(a) and (b) (1982). Thus, the record makes clear that the Administrator refused, on the ground of lack of authority, to decide whether the challenged regulations violated the Rehabilitation Act.

Finally, I would note my disagreement with the majority's characterization of Traynor's claim as a narrow one focusing solely on the technical complexities of the veterans' benefits laws as they apply to his particular claim for benefits. See Majority Opinion ante at 229. The thrust of Traynor's challenge to the validity of the VA alcoholism regulations is a general one, of apparently widespread practical application. Although the suit was not

brought as a class action, the complaint requests a declaratory judgment that the VA alcoholism regulations violate the Rehabilitation Act. This is a challenge that, if upheld, would result in changes having general application. And, as a Board member noted at Traynor's hearing, "this is not an isolated case. It's a continuing problem."

In sum, I think it plain that Traynor's challenge to the VA regulations on alcoholism raised a question under the Rehabilitation Act, a question on which he is entitled to a decision. Both because the Administrator disclaimed jurisdiction to decide it and because a decision would not have been one under a law providing veterans' benefits and administered by the VA, I would conclude that the district court had jurisdiction to entertain this challenge.

Since the majority reverses the judgment on jurisdictional grounds, I express no view as to the merits of Traynor's claim under the Rehabilitation Act.

## APPENDIX B

Opinion of the United States  
District Court, Southern  
District of New York,  
Dated April 4, 1985

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

82 Civ. 4563 (IBC)

\_\_\_\_\_ \*

EUGENE TRAYNOR,

Plaintiff,

-against-

HARRY N. WALTERS, ADMINISTRATOR OF  
THE VETERANS ADMINISTRATION; AND  
THE VETERANS ADMINISTRATION,

Defendants.

\_\_\_\_\_ \*

April 4, 1985

Legal Action Center of the City of New  
York, Inc., New York City, for plaintiff,  
Margaret K. Brooks, Richard C. Boldt,

Catherine H. O'Neill, New York City of counsel.

Rudolph W. Giuliani, U.S. Atty., S.D. N.Y., New York City, for defendants; Carolyn L. Simpson, Asst. U.S. Atty., New York City, Dean Gallin, Joan Weber, Veterans Admin., Washington, D.C., of counsel.

#### OPINION

IRVING BEN COOPER, District Judge.

Plaintiff seeks a declaratory judgment providing that the refusal of the Veterans Administration ("VA") to consider rehabilitated alcoholics for extensions of veterans' educational benefits pursuant to 38 U.S.C. §§ 1651-1662, violates the nondiscrimination provisions of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 701-794, and the fifth amendment. Plaintiff also seeks individual and

injunctive relief. Defendant moves to dismiss plaintiff's action on the ground of lack of subject matter jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1) or, in the alternative, for summary judgment in accordance with Fed.R.Civ.P. 56. Plaintiff cross-moves for summary judgment.

#### I. THE FACTS

Plaintiff is a 43 year old veteran of the United States Army who suffered from alcoholism until 1974. It is not known exactly how or why this condition developed, but plaintiff's deposition testimony reveals that both his father and brother imbibed to excess and that plaintiff himself first drank to the point of intoxication when he was between eight and ten years old. (D. 36-37; F.3)<sup>1</sup> During the

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<sup>1</sup> Throughout this opinion, the letter "D." followed by a number in parentheses indicates a particular page number in the

time he was in high school, 1955-60, plaintiff consumed alcohol regularly on weekends and occasionally on weeknights. (D. 37-39; F.3) Beginning in 1960, he began drinking more heavily and frequently. Sometime after 1964, plaintiff developed a pattern of daily absorption to the point of intoxication; he had grown to be dependent upon alcohol. (D. 11-17, 47; F.3)

Due to the effect of the alcohol on him, plaintiff's employment record is sporadic. In October 1963, plaintiff enlisted in the Army National Guard and served a six month period of active duty, during which time he completed basic

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transcript of defendants' deposition of plaintiff. The letter "F." followed by a number in parentheses indicates a particular page number in plaintiff's and defendants' Joint Statement of Undisputed Facts pursuant to S.D.N.Y. R. 3(g). The same applies to an "Ex." which refers to a specific exhibit.

training, from January through June 1964. (D. 9-10, 43; Ex. B-8 at 2; F.2)

In December 1964, he was hired to work nights as a maintenance mechanic by Lincoln Center for the Performing Arts in New York City. (D. 10-11; F. 2) However, he drank liquor during work hours, frequently leaving the site altogether to go to nearby bars. As a result, he was transferred to the day shift where he could be more closely supervised, but he was discharged in late 1967 for intoxication on the job and for job performance problems caused by his alcoholism. (D. 11-18, 46-47; F. 3)

After he lost that position plaintiff was called back to active duty in the Army. He served from February 27, 1968 through August 27, 1969 (18 calendar months), primarily in West Germany. Unfortunately, plaintiff's drinking habit



continued while he served on active duty; this brought on suffering from seizures; sixty-five days were deducted from his active duty period due to alcohol-related rule violations. Plaintiff was honorably discharged with the rank of private effective August 27, 1969. (D. 23; Ex. C-1; F. 2)

Following his discharge, plaintiff returned to Queens, New York where he lived with his family. In the next four and one half years his alcoholism became progressively more severe. During this period he maintained a pattern of daily drinking, resulting in frequent seizures, loss of consciousness, delirium tremors, blackouts and gastrointestinal bleeding. Indeed, he was hospitalized five times in

these four and one half years for treatment for saturated alcoholic disorders.<sup>2</sup>

Although at an early age plaintiff was aware that he drank more than other people, it made him feel "more stable...and more normal." (D. 47-48, 53-54) His family and treating physicians told him he had a drinking problem, but he denied identifying himself as an alcoholic and persisted in believing that he was able

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<sup>2</sup> His dates of hospitalization and summary of the diagnosed disorders for which he received treatment were as follows:

(a) March 6-12, 1970: alcoholism with delirium tremors; seizure disorder; hematemesis;

(b) May 3-11, 1971: alcoholism; gastrointestinal bleeding; hematemesis;

(c) April 30-May 11, 1973: alcoholism; seizure disorder; alcoholic gastritis with bleeding;

(d) August 29-September 1, 1973: history of alcoholism; convulsive disorder; alcoholic gastritis; gastrointestinal bleeding;

(e) January 24-February 2, 1974: chronic alcoholism; gastrointestinal bleeding; delirium tremors.

(D. 25-26; Ex. B-2, B-3, B-6 at 2, B-8 at 2-3, 7-8; F. 4-5)

to control or alter his drinking pattern.  
(D. 47-49, 54-55; F. 5-6)

In February 1974, after his last hospital stay, one of plaintiff's neighbors invited him to attend an Alcoholics Anonymous ("AA") meeting. Plaintiff maintains that within two weeks of his first AA meeting he was able to recognize his drinking problem and his inability to control it. He became a member of AA and continued attending meetings daily (and on occasion in the evening) for more than a year. Astonishingly and commendably, plaintiff has not had a drink since February, 1974; he still continues to be an active participant in AA. (D. 26-29, 54; Ex. B-8 at 3, B-2 at 21; F. 6)

Shortly thereafter plaintiff began seeking employment. He worked in two temporary seasonal jobs before he obtained a permanent job as a maintenance mechanic

with a photography concern in New York City in January 1976. He has been employed there full time since then and has been promoted to his present position as Supervisor of Maintenance. (D. 31-34; B-8 at 3-4; F. 6)

In the fall of 1977, plaintiff applied for admission to and was accepted by City College of New York ("CCNY") in its bachelor's degree program in mechanical engineering. In January 1978, plaintiff commenced his studies at CCNY attending school at night and working full time during the day.

Upon his admission to college, plaintiff applied for veteran's educational assistance benefits pursuant to 38 U.S.C. § 1651 et seq. Defendants determined that he was entitled to receive the benefits made eligible by virtue of his service on active duty in the Army and his

receipt of an honorable discharge. Based on the number of months plaintiff had served on active duty, the VA calculated that he was entitled to receive 24 months of educational assistance benefits.

However, as plaintiff knew, these benefits had to be absorbed before August 28, 1979 in order to satisfy 38 U.S.C. § 1662(a)(1), which provides:

No educational assistance shall be afforded an eligible veteran under this chapter beyond the date 10 years after the veteran's last discharge or release from active duty...; except that, in the case of any eligible veteran who was prevented from initiating or completing such veteran's chosen program of education within such time period because of a physical or mental disability which was not the result of such veteran's own willful misconduct,

such veteran shall, upon application... be granted an extension of the applicable delimiting period for such length of time as the Administrator determines, from the evidence, that such veteran was so prevented from initiating or completing such program of education.

Pursuant to the statute, plaintiff was entitled to receive educational benefits from the date of his discharge, August 27, 1969, until August 28, 1979, ten years later. However, by August 1979, plaintiff would have received only nine and one half of the 24 months of educational assistance benefits to which he was entitled. Consequently, in May 1979, plaintiff applied to the VA for an extension of his delimiting date (pursuant to 38 U.S.C. § 1662(a)(1)) on the ground that his history of, and gradual recovery from,



alcoholism had prevented him from initiating or pursuing his education until he first applied to CCNY.<sup>3</sup> Plaintiff filed his claim in defendants' regional office in New York City. (D. 63; Ex. B-1)

On August 9, 1979, defendants issued a "Rating Decision" denying plaintiff's claim for a delimiting date extension; it stated in part that plaintiff's "periods of hospitalization because of alcoholism are not for consideration, since they are a result of the veteran's own willful misconduct." (Ex. B-3)

Plaintiff appealed the rating decision to the Board of Veterans Appeals. (Ex. B-7) In his statement on appeal, plaintiff quoted the American Medical Association's Manual on Alcoholism in support of

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<sup>3</sup> Plaintiff stated that he did not think he was capable of working full time and going to school because he was "just really learning how to live again." (D. 62, 64) (emphasis ours)

his argument that alcoholism is universally recognized by the medical community as an illness capable of treatment. He contended further that the VA's characterization of alcoholism as willful misconduct was "wrong in fact and in law," and contradicted other federal agencies and statutes which recognize alcoholism as a disease. (Ex. B-7) A hearing was held in defendants' regional office in New York City where plaintiff was represented by counsel and witnesses called to testify in his behalf. In its findings and decision on plaintiff's appeal, the Board of Veterans Appeals upheld the original rating decision, stating:

We accept the premise that he may have been precluded from engaging in a program of education during the time he was an active alcoholic. We note that the simple drinking of alcoholic beverage is not of itself willful misconduct. However, the deliberate drinking of a known poisonous substance or under conditions which would raise a presumption to that effect will be considered



willful misconduct. While the medical community may view alcoholism as an illness for treatment purposes, it is our view that resort to alcohol, as shown in this case, is a willful misconduct condition. Therefore, the veteran may not be granted an extension of his delimiting period because of physical or mental disability brought about by his alcoholism, resulting from his own willful misconduct.

(Ex. B-9 at 4)

Plaintiff subsequently request[ed] a reconsideration of the decision by the Board of Veterans Appeals on the ground that the Board had erred as a matter of fact and law. (Ex. B-10) His request was granted and, on June 19, 1981, a hearing was held before an enlarged panel of the Board of Veterans Appeals in Washington, D.C. Its "Findings and Decision (Reconsideration)" was issued on November 9, 1981 and affirmed the original decision on appeal. (Ex. B-12)

Having exhausted his administrative remedies, plaintiff filed this action

seeking declaratory, injunctive and individual relief. Defendants oppose the claims and argue that this Court has no subject matter jurisdiction over this action.

## II. THE LAW

### A. JURISDICTION

Defendants move to dismiss plaintiff's action on the ground that this Court lacks subject matter jurisdiction. Defendants rely on 38 U.S.C. §211(a), which reads in pertinent part:

[T]he decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or

jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

Defendants contend that plaintiff's complaint seeks to overturn a decision of the Administrator made in the interpretation and application of a particular statute, 38 U.S.C. § 1662(a)(1), to a particular set of facts. They further argue that plaintiff's exclusive remedy was his appeal to the Board of Veterans Appeals (38 U.S.C. §§ 4001-4009) and, once his case was decided by the board, the decision was final and is not subject to review by this Court.

Plaintiff asserts that this Court has jurisdiction because plaintiff's challenge arises under the Constitution and laws of the United States. Specifically, plaintiff alleges that defendants' procedures and regulations with regard to the exten-

sion of delimiting dates for alcoholics violate the Rehabilitation Act of 1973, as amended, 29 U.S.C. §794, and the equal protection and due process clauses of the fifth amendment.

[1] Furthermore, as plaintiff correctly insists, jurisdictional limitations in statutes are to be interpreted narrowly in light of a basic presumption of judicial review which governs in the absence of clear and convincing evidence of congressional intent to the contrary. Abbott Laboratories v. Gardner, 387 U.S. 136, 141, 87 S.Ct. 1507, 1511, 18 L.Ed.2d 681 (1967); Rusk v. Cort, 369 U.S. 367, 379-80, 82 S.Ct. 787, 794, 7 L.Ed.2d 809 (1962); Kirkhuff v. Nimmo, 683 F.2d 544, 546 (D.C. Cir. 1982).

In Johnson v. Robison, 415 U.S. 361, 94 S.Ct. 1160, 39 L.Ed.2d 389 (1974), the Supreme Court held that § 211(a) did not

preclude judicial review of the constitutionality of veterans' benefits legislation; that any other holding would raise serious questions about the constitutionality of §211(a). The Court held that § 211(a) is "aimed at questions arising in the administration of a statute" and noted that its purpose is two-fold:

(1) to insure that veterans' benefits claims will not burden the courts and the Veterans' Administration with expensive and time-consuming litigation, and (2) to insure that the technical and complex determinations and applications of Veterans' Administration policy connected with veterans' benefits decisions will be adequately and uniformly made.

415 U.S. at 367, 370, 94 S.Ct. at 1167  
(emphasis in original)

[2] Federal courts have since applied Johnson's holding to constitutional challenges to VA regulations and to the authority of the VA to promulgate regulations. Devine v. Cleland, 616 F.2d 1080 (9th Cir. 1980); Wayne State University v. Cleland, 590 F.2d 627 (6th Cir. 1978); Tinch v. Walters, 573 F.Supp. 346, 347 (E.D.Tenn. 1983); Beauchesne v. Nimmo, 562 F.Supp. 250, 254 (D. Conn. 1983). In short, judicial review of decisions of the VA is not precluded when the decision involves issues such as the constitutionality of a statute or a regulation.

[3] To determine whether plaintiff's claim arises under the Constitution and laws of the United States, we look to the allegations of the complaint. North American Phillips Corp. v. Emery Air Freight Corp., 579 F.2d 229, 233 (2d Cir. 1978). Here, plaintiff challenges the VA's inter-



pretation of §1662(a)(1) of the Veterans' Educational Benefits statute which distinguishes between alcoholics with secondary organic disabilities, or those whose alcoholism is a secondary effect of an underlying psychological disorder, and alcoholics who do not suffer from these defects; the VA regulation permits consideration of an application for an extension of the delimiting date to the former group while denying it to the latter. Plaintiff claims that this regulation is violative of the Rehabilitation Act, 29 U.S.C. §794, and the fifth amendment's due process and equal protection guarantees. Since this decision requires us to examine constitutional and statutory questions and not merely issues of VA policy, we conclude, in accordance with the Supreme Court's holding in Johnson, supra, that we are not precluded from exercising

our jurisdiction in this matter by 38 U.S.C. §211(a). Accordingly, defendants' motion to dismiss for lack of jurisdiction is denied.

#### B. CONSTITUTIONAL CHALLENGE

[4] Plaintiff claims that the VA's regulations defining "alcoholism" deprive him of due process and equal protection of the laws as guaranteed by the fifth amendment.

As we have already stated, 38 U.S.C. §1662(a)(1) prohibits an extension or the delimiting date for veterans' educational benefits to any veteran whose physical or mental disability is the result of such veteran's own "willful misconduct." 38 C.F.R. §3.1(n) defines the term "willful misconduct" as follows:

"Willful misconduct" means an act involving conscious wrongdoing or known



prohibited action (malum in se or malum prohibitum)....

(1) It involves deliberate or intentional wrongdoing with knowledge of or wanton and reckless disregard of its probable consequences.

(2) Mere technical violation of police regulations or ordinances will not per se constitute willful misconduct.

(3) Willful misconduct will not be determinative unless it is the proximate cause of injury, disease or death.

More specifically, 38 C.F.R. §3.301

(c)(2) defines the term "willful misconduct" as applied in the context of alcoholism in this matter:

(2) Alcoholism. The simple drinking of alcoholic beverage is not of itself willful misconduct. The deliberate drinking of a known poisonous substance or under conditions which would raise

a presumption to that effect will be considered willful misconduct. If, in the drinking of a beverage to enjoy its intoxicating effects, intoxication results approximately [sic] and immediately in disability or death, the disability or death will be considered the result of the person's willful misconduct. Organic diseases and disabilities which are a secondary result of the chronic use of alcohol as a beverage, whether out of compulsion or otherwise, will not be considered of willful misconduct origin.

In Administrator's Decision, Veterans' Administration No. 988 (Aug. 13, 1964), the VA recognized a distinction between alcoholism as a primary disorder and "alcoholism as secondary to and a manifestation of an acquired psychiatric disorder. If the latter condition is found

the resulting disability or death is not to be considered as willful misconduct."

It is apparent that the VA distinguishes between alcoholism as a primary disorder, on the one hand, and alcoholism as the secondary result of a psychiatric disorder and organic disabilities which result from chronic use of alcohol, on the other. Clearly, the former is classified as a disability caused by a veteran's own willful misconduct; the latter is not.

In challenging the constitutionality of these regulations, plaintiff argues that the distinction between primary alcoholics and those whose alcoholism results from a diagnosable psychological disorder, or those who suffer from organic disabilities as a result of their alcoholism, creates two classes of alcoholics. He asserts that the classification of

primary alcoholism as willful misconduct, resulting in the complete exclusion of primary alcoholics from consideration for extensions of delimiting dates, violates constitutional guarantees.

In Weinberger v. Salfi, 422 U.S. 749, 772, 95 S.Ct. 2457, 2470, 45 L.Ed.2d 522 (1974), the Supreme Court declared:

[A] noncontractual claim to receive funds from the public treasury enjoys no constitutionally protected status ... though of course Congress may not invidiously discriminate among such claimants on the basis of a 'bare congressional desire to harm a politically unpopular group,' ... or on the basis of criteria which bear no rational relation to a legitimate legislative goal.

It is clear that veterans' educational benefits are noncontractual in nature; consequently, pursuant to the Supreme Court's opinion in Weinberger, the test to be applied to defendants' classification of primary alcoholics is whether there is a rational relation to a legit-

imate government purpose in the classification.

We have no hesitancy in concluding that there is a rational basis for this classification by the VA: In order to avoid the possibility of fraudulent claims by primary alcoholics whose disabilities are less easily proved, the VA has chosen to favor those who have clear-cut, medically demonstrable disabilities which existed during the time they were eligible for educational assistance benefits and which were the cause of their inability to begin or complete their education. (Ex. B-12 at 6)

Because we find a rational relation between the two classifications of alcoholics and the legitimate goal of the VA we find that plaintiff's challenge to the constitutionality of the VA's "willful misconduct" regulations must fail.

### C. STATUTORY CHALLENGE

Plaintiff further contends that the VA's "willful misconduct" regulations violate the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-794. Specifically, he argues that he is a handicapped person within the meaning of the Act, and that he has been discriminated against solely on that basis.

Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, provides in relevant part:

No otherwise qualified handicapped individual in the United States, as defined in section 7(6) of this Act shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal



financial assistance or under any program or activity conducted by any Executive agency ... The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section.

[5, 6] In determining whether §504 has been violated, our Court of Appeals has enunciated a four-part test requiring a plaintiff to demonstrate that: (1) he is a "handicapped individual" under the Act; (2) he is "otherwise qualified" for the program of benefits from which he has been excluded; (3) he has been excluded "solely" because of his handicap; and (4) the program from which he is excluded is subject to §504. Doe v. New York University, 666 F.2d 761, 774-75 (2d Cir. 1981). Once plaintiff makes out his prima facie case, the burden shifts to defendants,

who must make a substantial showing that the regulation or practice is justified. Mere reasonableness will not suffice. New York State Association for Retarded Children v. Carey, 612 F.2d 644, 649-50 (2d Cir. 1979).

We now proceed to examine each element of the four-part test. First, Congress has defined a handicapped individual as follows:

[T]he term "handicapped individual" means, for the purposes of titles IV and V of this Act [under which the instant case falls], any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

29 U.S.C. §706(7)(B).



After the enactment of §504, the Department of Health, Education and Welfare ("HEW") was designated the leading agency to promulgate regulations pursuant to Executive Order 11914 (issued April 28, 1976). The President instructed HEW to:

coordinate the implementation of Section 504...by all Federal departments and agencies empowered to extend Federal financial assistance to any program or activity. The Secretary shall establish standards for determining who are handicapped individuals and guidelines for determining what are discriminatory practices within the meaning of Section 504.... In order to implement the provisions of Section 504, each Federal department and agency empowered to provide Federal financial assistance shall issue rules, regulations, and directives, consistent with

the standards and procedures established by the Secretary of Health, Education, and Welfare.

In the process of carrying out the Executive Order, HEW was faced with the question of whether alcoholics (and drug addicts) are "handicapped individuals" within the meaning of the Rehabilitation Act. The Secretary requested an opinion of the Attorney General of the United States; that opinion was released in 1977. (43 Op. Att'y Gen. No. 12 (April 12, 1977))

The Attorney General concluded that §504 "does in general prohibit discrimination against alcoholics and drug addicts in federally assisted programs solely because of their status as such, just as it prohibits discrimination solely on the

basis of other diseases or conditions covered by the Act."<sup>4</sup>

The opinion reviews the legislative history of the Rehabilitation Act. Specifically, it notes that the 1973 Act replaced the Vocational Rehabilitation Act, 29 U.S.C. §31 et seq. (1970), which defined a handicapped person as one who hadws a physical or mental disability that impaired his employability but might reasonably be expected to benefit from the vocational rehabilitation services provided by the Act. The Rehabilitation Act continued the approach taken in the earlier statute with regard to vocational

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<sup>4</sup> However, the Attorney General was careful to point out that the inclusion of alcoholics and drug addicts within the definition of "handicapped individual" does not mean that they must be permitted to participate in a program, or be hired, if the manifestations of their condition prevent them from adequate participation in the program or performing the job in question. 43 Op. Att'y Gen. No. 12 (April 12, 1977).

rehabilitation and preserved its definition of "handicapped individual." See 29 U.S.C. §706(7)(A). The opinion notes that alcoholics were considered handicapped under the 1970 Act; that the House Report on the 1973 Act reflects this fact and gives no indication that it intended to alter the meaning under the new Act. 43 Op. Att'y Gen. No. 12 (April 12, 1977).

The opinion further points out that the definition of "handicapped individual" was amended in 1974 to add what is now §706(7)(B), which encompasses impairments that "substantially limit" one's "major life activities" within the meaning of "handicapped individual." The definition was broadened because the prior version, which only covered impairments to employability, was not adequate for the purposes of the new, broader antidiscrimination provisions in the Rehabilitation Act.

Among those provisions is §504, which prohibits discrimination against handicapped individuals in any program or activity receiving Federal financial assistance. This includes programs in housing, health care and education, as well as employment.

Finally, the Attorney General notes that although there is considerable disagreement as to the precise nature of drug addition and alcoholism, there is a substantial body of authority to support Congress' conclusion that both are diseases which would be included within the meaning of "physical or mental disabilities." The opinion concludes that it is certainly not irrational to read §504 as including drug addicts and alcoholics, particularly in light of the legislative history of the Rehabilitation Act.

HEW's guidelines implementing §504 were promulgated in 1978. 43 Fed. Reg. 2132 (1978). As noted earlier, HEW was instructed to define the meaning of "handicapped individual," and its regulations were to serve as the model which all other Federal agencies were to follow. The rule ultimately adopted explicitly includes alcoholics within the meaning of "handicapped person." It reads as follows:

(a) "Handicapped person" means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

(b) As used in paragraph (a) of this section, the phrase:

(1) ... "physical or mental impairment" includes, but is not limited



to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism.

43 Fed. Reg. 2137 (1978) (emphasis added).

[7] In 1980, the VA adopted the HEW guidelines, specifically using the exact language quoted in its definition of "handicapped person." 38 C.F.R. §18.403 (j)(2)(i)(C). Therefore, in accordance with the first factor enunciated by our Circuit in Doe v. New York University, supra, at 774, plaintiff, an alcoholic, clearly comes within the category of "handicapped individual" under §504 of the Rehabilitation Act.

[8, 9] The second factor for determination in Doe v. New York University is

whether the plaintiff is "otherwise qualified" for the benefits program from which he has been excluded. An "otherwise qualified" handicapped person is one who is able to meet all of a program's requirements in spite of his handicap, as opposed to one who meets all of the requirements except as to limitations imposed by the handicap. Southeastern Community College v. Davis, 442 U.S. 397, 406, 99 S.Ct. 2361, 2367, 60 L.Ed.2d 980 (1979). With regard to educational benefits, the term "otherwise qualified" denotes one who "meets the academic and technical [i.e., nonacademic] standards requisite to admission or participation" with respect to educational programs, and one who "meets the essential eligibility



requirements" for the receipt of other services.<sup>5</sup>

[10] It is undisputed that plaintiff meets the basic eligibility for and entitlement to educational assistance benefits under Chapter 34 of the Veterans' Benefits Law. His armed services record and subsequent enrollment in a program of education at CCNY entitled him to educational benefits which he received until the end of his delimiting period. We are, therefore, convinced that plaintiff is an "otherwise qualified" handicapped person.

We must next consider whether plaintiff was denied participation in the program solely on the basis of his handicap. The VA's regulatory scheme defines primary

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<sup>5</sup> See 43 Fed. Reg. 2137 (1978) (HEW regulations coordinating federal agency enforcement of §504); 38 C.F.R. §18.403(k) (VA regulations implementing §504).

alcoholism as willful misconduct per se. This policy resulted in the automatic exclusion of plaintiff from consideration for an extension of his delimiting date based solely on his history of alcoholism. Since plaintiff has demonstrated that he is an otherwise qualified handicapped person and that he was denied an extension due to his past alcoholism, it is apparent that plaintiff was denied an extension solely on the basis of his handicap.

[11] The final factor we must consider under the Second Circuit test in Doe v. New York University is whether the veterans' educational assistance program from which plaintiff has been excluded is subject to §504. The section explicitly states that it covers "any program or activity receiving Federal financial assistance or under any program or activ-

ity conducted by any Executive agency."

29 U.S.C. §794. (emphasis added)

Furthermore, the VA regulations implementing §504 specifically list the veterans' educational benefits program as one of the programs to which §504 applies. 38 C.F.R. 31, Appendix A to Subpart D (Statutory Provisions to Which this Subpart Applies) (1980). Consequently, it is clear that the Veterans' Educational Assistance program is subject to §504.

[12] In sum, plaintiff has met his burden of proving that he is a handicapped person within the meaning of the Rehabilitation Act, that he is otherwise qualified to receive an extension of his delimiting date, that he was excluded from consideration for an extension solely on the basis of his handicap, and that the veterans' educational benefits program from which he was excluded is subject to

§504; i.e., plaintiff has proven his prima facie case of discrimination under §504 of the Rehabilitation Act, and the burden is on defendants to prove that the challenged regulations are justified in light of §504. In so doing, defendants may not rest merely on an assertion that the challenged regulations and policy are reasonable; as noted earlier, defendants must make a substantial showing that the regulations are justified. New York State Association for Retarded Children v. Carey, supra, at 650.

Defendants argue that the willful misconduct bar is a narrow exception to the Rehabilitation Act. However, defendants fail to recognize that plaintiff is not challenging the willful misconduct language in the statute itself (38 U.S.C. §1662(a)(1)), but the VA's interpretation and policy reflected in its regulations

which define primary alcoholism as willful misconduct. Therefore, in contrast to defendants' assertion there is no conflict between two statutes, i.e., the willful misconduct statute, 38 U.S.C. §1662(a)(1), and §504 of the Rehabilitation Act, 29 U.S.C. §794.

Furthermore, we find that defendants fail to make a substantial showing that their regulations and policy are justified in light of §504. Indeed, the VA policy of excluding those with a history of primary alcoholism from consideration for extensions of delimiting dates contravenes the Rehabilitation Act by discriminating against those rehabilitated alcoholics (a remarkable accomplishment) most deserving of aid.

Our opinion is bolstered by a recent decision in the Eastern District of Tennessee. In Tinch v. Walters, 573 F.Supp.

346 (E.D. Tenn. 1983), the plaintiff, a veteran, was a rehabilitated alcoholic who challenged the same regulations and policy as the instant plaintiff. The Court found that no substantial justification for the VA's policy was apparent, stating, "While the Court cannot find that the policies and regulations are unconstitutional, they are impaired by the application of the willful misconduct bar, and they are in violation of the Rehabilitation Act of 1973, as amended, specifically 29 U.S.C. §794." 573 F.Supp. at 348.

Similarly, we find that although defendants' regulations challenged herein withstand constitutional scrutiny, they violate §504 of the Rehabilitation Act, 29 U.S.C. §794.

Accordingly, plaintiff's application for a declaratory judgment is granted.

Further, plaintiff's motion for summary judgment is granted and the defendants' motions to dismiss or for summary judgment are denied.

SO ORDERED.

# APPENDIX C

Judgment and Order of the District Court, Southern District of New York, entered June 6, 1985

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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EUGENE TRAYNOR,

Plaintiff,

-against-

HARRY W. WALTERS, Administrator of  
the Veterans Administration; and  
the VETERANS ADMINISTRATION,

Defendants.

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## JUDGMENT AND ORDER

82 Civ. 4563 (IBC)

Upon the cross-motions for summary judgment filed by plaintiff and by defendants, and upon the Opinion of this Court



filed April 4, 1985, it is hereby Adjudged and Ordered as follows:

1. Defendants' motion to dismiss plaintiff's complaint for lack of subject matter jurisdiction under 38 U.S.C. §211(a) is denied.

2. Plaintiff's request for a declaratory judgment is granted in that it is declared that the defendants' regulation set forth in 38 C.F.R. §3.301(c)(2) violates the Rehabilitation Act of 1973, as amended, 29 U.S.C. §794; but defendants' regulation does not deprive plaintiff of his due process and equal protection rights under the Fifth Amendment to the Constitution;

3. Plaintiff's request for summary judgment is granted in that plaintiff's application for an extension of his delimiting date is remanded to the

defendants for further proceedings not inconsistent with this opinion;

4. Defendants' motion for summary judgment is denied.

SO ORDERED:

/S/ IRVING BEN COOPER  
U.S.D.J.

Dated: June 6, 1985

New York, New York

## APPENDIX D

Order of the United States Court of  
Appeals, Second Circuit,  
Entered July 15, 1986

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 15th day of July one thousand nine hundred and eighty-six.

No. 85-6208

\_\_\_\_\_\*\_\_\_\_

EUGENE TRAYNOR,  
Plaintiff-Appellee,

-against-

HARRY W. WALTERS, ADMINISTRATOR OF  
THE VETERANS ADMINISTRATION,  
Defendants-Appellants.

\_\_\_\_\_\*\_\_\_\_

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellee, Eugene Traynor,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED. Judge Kearse dissenting.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/

Elaine B. Goldsmith,  
Clerk

## APPENDIX E

VA Rating Decision For Purposes  
of Extension of Delimiting Date  
of Eugene Traynor,  
File No. SS 091-34-0921,  
Dated August 8, 1979  
[Relevant Excerpts]

Veteran's delimiting date is 8-28-79.  
He commenced receiving educational allowance on 2-4-78.

The veteran has a long history of chronic alcoholism, and was hospitalized at City Center at Elmhurst for the following periods: 3-6-70 to 12-70. Admitted because of convulsive seizures. Impression was delirium tremens. 5-3-71 to 5-11-71. Admitted because of hematemesis. 4-30-73 to 5-11-73. Clinical impression: alcoholism, seizure disorder. Admitted for upper GI bleeding (slight), and seizure 8-29-73 to 9-1-73. Developed hematemesis and convulsions day prior to admission. Diagnosis: convulsive disorder.

1-24-74 to 2-2-74. History of hematemesis for three days. Diagnosis: upper GI bleeding, chronic alcoholism. Upper GI Series revealed ulcer crater of duodenal bulb. 5-23-75. Two sebaceous cysts of neck midline above thyroid were excised.

The above periods of hospitalization, all less than 30 days duration, did not render training medically infeasible. In addition, those periods of hospitalization because of alcoholism are not for consideration, since they are the result of the veteran's own willful misconduct.

/s/ J. Frein, M.D.

/s/ W. Moldoff

/s/ A. Minieri

## APPENDIX F

Board of Veterans Appeals Findings and  
Decision in the Appeal of Eugene Traynor,  
SS 091-34-0921, Docket No. 80-26-433,  
dated December 17, 1980

## THE ISSUE

Entitlement to educational assistance  
allowance benefits under Chapter 34, Title  
38, United States Code, beyond the delimiting date.

## REPRESENTATION

Appellant represented by: S.I.R.,  
Attorney

## WITNESSES AT HEARING ON APPEAL

Appellant, C.S., and Dr. D.G.

## CONSULTATIONS BY THE BOARD

T. Pace, Staff Legal Adviser

## CONTENTIONS

The veteran and his representative contend that the veteran's recovery from the disease of alcoholism was not sufficient to permit full-time employment until January 1976; that from the date of discharge until February 1974 the veteran was unable to hold a steady job because of his disability; and that he did some work as a maintenance worker in 1975 but was unemployed much of that year. It is argued that alcoholism is a disease and not willful misconduct and is so viewed by the American Medical Association. It is felt that the veteran is entitled to "recover the monies which would have been forthcoming had not the ten year benefits been deemed to be expired." It is asserted that "He has been continually taking courses since August, 1979 (the termination date determined by the VA) and he seeks



reimbursement of those sums he would have received since August, 1979."

#### THE EVIDENCE

The veteran served on active duty from February 1968 to August 1969, and was awarded educational assistance benefits for the period from February 4, 1978, to June 8, 1979. He was advised, early in 1979, that his remaining entitlement would be 14-1/2 months as of June 8, 1979. However, he was also notified that the law did not permit payment of benefits after August 27, 1979. In May 1979 he requested an extension of his eligibility period for the utilization of his educational benefits.

In May 1979 copies of medical reports were received from a city hospital center. These records reveal that he was hospitalized from March 6 to 12, 1970, for

treatment of a seizure disorder with convulsions. Also diagnosed was alcoholism with delirium tremens. Data recorded for clinical purposes disclose a history of chronic alcoholism with heavy drinking three days prior to admission. He was again hospitalized at the facility from May 3 to May 11, 1971, for hematemesis. In addition to gastrointestinal bleeding, alcoholism was noted. He was again hospitalized from April 30 to May 11, 1973, for alcoholism and his seizure disorder. He was hospitalized from August 29 to September 1, 1973, for convulsive disorder and possible alcoholic gastritis. He was also hospitalized from January 24 to February 2, 1974, for upper gastrointestinal bleeding. Reference was again made to alcoholism. Outpatient treatment records from the hospital facility disclosed that the veteran was an active patient in their

alcoholism program from April to May 1975. His last date of attendance was in May 1975.

At the claimant's personal hearing in August 1980, he testified that he had a number of alcohol-related hospitalizations following service until February 1974; that his involvement in Alcoholics Anonymous is what stopped the active alcoholism since 1974; and that there were periods where he was unemployed from 1974 to 1975. The veteran stated that he definitely was not capable of going to college prior to 1974 when he was an alcoholic, that he was really devastated by the alcohol and that the recovery from his alcoholism is a very slow process and takes a lot of time. He maintained that he was unable to enter an educational program prior to commencement of his rehabilitation in 1974, and that the delimiting period should be ex-

tended to allow him additional time and money to complete his education. Testimony was received from a professional worker in alcoholism, who described the nature and type of medical treatment administered to alcoholics. A physician was also in attendance and testified to the effect that alcoholism is acknowledged in the medical community as a disease and is treated as such. He stated that it would be reasonable in holding that it would take a couple of years of rehabilitative therapy for an alcoholic before he could obtain a full-time job. He implied that since alcoholism involves a continuous struggle it would be difficult for an individual to pursue his education.

#### THE LAW AND REGULATIONS

No educational assistance shall be afforded an eligible veteran under this

chapter beyond the date 10 years after the veteran's last discharge or release from active duty after January 31, 1955; except that, in the case of an eligible veteran who was prevented from initiating or completing such veteran's chosen program of education within such time period because of a physical or mental disability which was not the result of such veteran's own willful misconduct, such veteran shall, upon application, be granted an extension of the applicable delimiting date for such length of time as the Administrator determines, from the evidence, that such veteran was prevented from initiating or completing such program of education. (38 U.S.C. 1662)

A veteran shall be granted an extension of an applicable delimiting period provided the veteran was prevented from initiating or completing the chosen program

of education within the otherwise applicable delimiting period because of a physical or mental disability that did not result from the willful misconduct of the veteran. It must be clearly established by medical evidence that such a program of education was medically infeasible. A veteran who was disabled for a period of 30 days or less will not be considered as having been prevented from initiating or completing a chosen program, unless the evidence established that the veteran was prevented from enrolling or reenrolling in the chosen program of education or was forced to discontinue attendance, because of the short disability. (38 C.F.R. 21.1043)

Willful misconduct means an act involving conscious wrongdoing or known prohibited action (*malum in se* or *malum prohibitum*). It involves deliberate or



intentional wrongdoing with knowledge of or wanton and reckless disregard of its probable consequences. Mere technical violation of police regulations or ordinances will not per se constitute willful misconduct. Willful misconduct will not be determinative unless it is the proximate cause of injury, disease or death. (38 C.F.R. 3.1(n))

#### DISCUSSION AND EVALUATION

Under governing law, educational assistance is not payable beyond the 10 years after the veteran's discharge from service in August 1969. However, if the veteran was prevented from completing his education within that time frame because of physical or mental disability, he may be granted an extension of the applicable delimiting period. However, this extension is not for application for disability

the result of the veteran's own wilful misconduct.

In the present case, we note that the veteran was hospitalized on various occasions from 1970 to 1974 and treated for alcoholism and disabilities resulting therefrom. We accept the premise that he may have been precluded from engaging in a program of education during the time he was an active alcoholic. We note that the simple drinking of alcoholic beverage is not of itself willful misconduct. However, the deliberate drinking of a known poisonous substance or under conditions which would raise a presumption to that effect will be considered willful misconduct. While the medical community may view alcoholism as an illness for treatment purposes, it is our view that resort to alcohol, as shown in this case, is a willful misconduct condition. There-



fore, the veteran may not be granted an extension of his delimiting period because of physical or mental disability brought about by his alcoholism, resulting from his own willful misconduct. In addition, it has not been shown that the veteran was prevented from enrolling in a program of education earlier in his 10-year period of eligibility because of mental disability for which he was hospitalized for periods of more than 30 days at a time.

#### FINDINGS OF FACT

1. The veteran served on active duty from February 1968 to August 1969; his educational program did not begin until 1978.

2. During his eligibility period for the utilization of his educational benefits, the appellant was hospitalized and treated on various occasions from 1970 to

1974 for chronic alcoholism and associated disability, no period of hospitalization lasting longer than 12 days.

3. The resorting to alcohol was the result of his own willful misconduct.

4. The veteran was not prevented from initiating or pursuing his education by reason of a ratable physical or mental disability, not the result of his own willful misconduct.

#### CONCLUSION OF LAW

Educational assistance allowance benefits cannot be afforded the veteran for the pursuit of a program of education beyond the delimiting date. (38 U.S.C. 1662; 38 C.F.R. 3.1(n), 21.1043)

#### DECISION

Entitlement to educational assistance benefits under Chapter 34, Title 38,

United States Code, beyond the delimiting date is not established.

The benefits sought on appeal are denied.

S/ Raoul L. Carroll      S/ E.M. Krenzer

S/ James J. Butler

#### APPENDIX G

Board of Veterans Appeals Findings and Decision (Reconsideration) in the Appeal of Eugene Traynor, SS 091-34-0921, Docket No. 81-04-812, dated November 9, 1981

#### THE ISSUE

Entitlement to educational assistance allowance benefits under Chapter 34, Title 38, United States Code, beyond the delimiting date.

#### REPRESENTATION

Appellant represented by: S.I.R.,  
Attorney

#### WITNESS AT HEARING ON APPEAL

Appellant, C.S., and Dr. D.G.

#### CONSULTATIONS BY THE BOARD

Barry Anderson, Staff Legal Adviser

ACTIONS LEADING TO  
PRESENT APPELLATE STATUS

The issue on appeal was previously before the Board in December 1980, at which time it was unanimously held that the veteran was not entitled to educational assistance allowance benefits beyond the delimiting date. In its decision of December 1980, the Board made the following pertinent findings of essential facts:

1. The veteran served on active duty from February 1968 to August 1969; his educational program did not begin until 1978.
2. During his eligibility period for the utilization of his educational benefits, the appellant was hospitalized and treated on various occasions from 1970 to 1974 for chronic alcoholism and associated disability, no period of hospital-

ization lasting longer than 12 days.

3. The resorting to alcohol was the result of his own willful misconduct.
4. The veteran was not prevented from initiating or pursuing his education by reason of a ratable physical or mental disability, not the result of his own willful misconduct.

On the basis of these facts, the Board reached the following conclusion of law:

Educational assistance allowance benefits cannot be afforded the veteran for the pursuit of a program of education beyond the delimiting date. (38 U.S.C. 1662; 38 C.F.R. 3.1(n), 21.1043)

The veteran has requested that this decision be reconsidered, maintaining that findings of fact numbered 3 and 4,

above, represent an error, that there is no medical authority today which will substantiate such findings, and there is almost universal medical opinion to the contrary within the Veterans Administration as well as elsewhere. For the purpose of reconsideration, an enlarged panel consisting of two sections of the Board of Veterans Appeals has been assembled.

#### CONTENTIONS

The veteran appeared at a personal hearing before the Board of Veterans Appeals in June 1981. At the hearing, the veteran and his representative presented a detailed exposition of his contentions. A summary of those contentions is set forth below.

It was contended by and on behalf of the veteran that he was prevented from pursuing his chosen program of education

within the 10-year delimiting period by the nonwillful disease of alcoholism, and that he was improperly denied benefits in that the Veterans Administration applied its rule that alcoholism without secondary complications is a result of misconduct.

The veteran's representative stated that they appeared primarily to present constitutional arguments against the pertinent regulation promulgated by the Veterans Administration. In this regard, it was asserted that the position of the Veterans Administration is in excess of or contrary to the statutory authority conferred by 38 U.S.C. 1662 and other statutes, has no rational basis to sustain it, and thereby denies the veteran equal protection of the laws.

It was maintained that the Veterans Administration, clinging to an outmoded moral concept, has chosen to ignore the



fact that alcoholism is a disease; that every medical body of importance in the United States has stated that alcoholism is a disease; and that Congress declared in Title 42 of the United States Code that alcoholism is an illness requiring treatment.

While acknowledging that the Board of Veterans Appeals might not be the proper forum, the veteran's representative declared that the veteran was trying to help the Administrator of Veterans Affairs make another decision.

The veteran testified, in effect, that he was discharged from service in 1969, started college in 1978, and never did attempt to go to school during this period. He indicated that he was not treated or admitted to any hospital other than the several hospitalizations between 1970-1974, totaling less than 45 days.

Transcripts were furnished the veteran and his attorney.

#### THE LAW AND REGULATIONS

The Board of Veterans Appeals shall be bound in its decisions by the regulations of the Veterans Administration, instructions of the Administrator, and the precedent opinions of the chief law officer. (38 U.S.C. 4004(c))

The decision of the Board of Veterans Appeals is final, except that the Board may correct an obvious error in the record. Reconsideration of an appellate decision may be accorded by the Board of Veterans Appeals. (38 U.S.C. 4003; 38 C.F.R. 19.148)

No educational assistance shall be afforded an eligible veteran under this chapter beyond the date 10 years after the veteran's last discharge or release

from active duty after January 31, 1955; except that, in the case of any eligible veteran who was prevented from initiating or completing such veteran's chosen program of education within such time period because of a physical or mental disability which was not the result of such veteran's own willful misconduct, such veteran shall, upon application, ...be granted an extension of the applicable delimiting period for such length of time as the Administrator determines, from the evidence, that such veteran was so prevented from initiating or completing such program of education. It must be clearly established by medical evidence that such a program of education was medically infeasible. A veteran who is disabled for a period of 30 days or less will not be considered as having been prevented from initiating or completing a chosen program,

unless the evidence establishes that the veteran was prevented from enrolling or reenrolling in the chosen program of education, or was forced to discontinue attendance, because of the short disability. (38 U.S.C. 1662(a); 38 C.F.R. 21.1042(a), 21.1043(a))

Willful misconduct means an act involving conscious wrongdoing or known prohibited action (*malum in se* or *malum prohibitum*). It involves deliberate or intentional wrongdoing with knowledge of or wanton and reckless disregard of its probable consequences. Mere technical violation of police regulations or ordinances will not per se constitute willful misconduct. Willful misconduct will not be determinative unless it is the proximate cause of injury, disease or death. (38 C.F.R. 3.1(n))

The simple drinking of alcoholic beverage is not of itself willful misconduct. The deliberate drinking of a known poisonous substance or under conditions which would raise a presumption to that effect will be considered willful misconduct. If, in the drinking of a beverage to enjoy its intoxicating effects, intoxication results proximately and immediately in disability or death, the disability or death will be considered the result of the person's willful misconduct. Organic diseases and disabilities which are a secondary result of the chronic use of alcohol as a beverage, whether out of compulsion or otherwise, will not be considered of willful misconduct origin.

(38 C.F.R. 3.301(c)(2))

The December 1980 decision of the Board, denying the veteran entitlement to an extension of his period of eligibility

beyond his basic delimiting date for the purpose of receiving additional educational assistance allowance under the provisions of Chapter 34, Title 38, United States Code, was final. It may not be disturbed in the absence of obvious legal or factual error. The essential consideration of this enlarged panel, therefore, is whether the record upon which the prior decision was based contained such clear and convincing evidence as to admit of no objective conclusion other than that the decision was contrary to the evidence. A difference of opinion or judgment concerning the evaluation and interpretation of the evidence is insufficient to find obvious error.

This enlarged panel has made a careful, detailed and independent study of the evidence of record as of the December 1980 decision of the Board. The Board at



that time, in effect, denied the veteran's claim on two bases. In addition to holding that the veteran might not be granted an extension of his delimiting period because of disability brought about by alcoholism resulting from his own willful misconduct, the Board noted that it had not been shown that the veteran was prevented from enrolling in a program of education earlier than 1978 because of disability for which he was hospitalized for periods of more than 30 days at a time.

The testimony presented by the veteran at his June 1981 hearing before the Board does not change, and in fact supports, the Board's prior finding of fact that, during his eligibility period for the utilization of his educational benefits, the veteran was hospitalized and treated on various occasions from 1970 to 1974 for chronic

alcoholism and associated disability, no period of hospitalization lasting longer than 12 days. On reconsideration of the Board's prior decision, the veteran has not challenged the Veterans Administration regulation which mandates that a disability for a period of 30 days or less will not be considered as having prevented an eligible person from initiating or completing a chosen program of education absent a showing that the person was prevented from enrolling or reenrolling in the chosen program or was forced to discontinue attendance because of the short disability. On this basis alone, the Board is again compelled to conclude that educational assistance allowance cannot be granted the veteran for the pursuit of a program of education beyond the basic delimiting date.



The Board has noted the contentions on appeal directed primarily to presenting constitutional arguments against what is perceived as an unconstitutionally offensive Veterans Administration regulation. The assertion that a denial of additional Chapter 34 benefits would constitute a denial of equal protection under the law has also been noted. However, the constitutional question is beyond the power of the Board of Veterans Appeals to decide. (Johnson v. Robison, 415 U.S. 361, 368 (1974)) Furthermore, we are constrained to note that the Board of Veterans Appeals is bound in its decisions not only by instructions of the Administrator of Veterans Affairs but also by the regulations of the Veterans Administration.

In response to the primary contentions of the veteran, we wish to express our opinion that the veteran entertains a

misconception of the policy of the Veterans Administration with respect to alcoholism and willful misconduct. It has been consistently the policy of the Veterans Administration that alcoholism can and should be considered an illness for purposes of medical treatment and rehabilitation, and that the simple drinking of any alcoholic beverage is not in and of itself willful misconduct. On the other hand, if in the consumption of alcohol for the purpose of enjoying its intoxicating effects excessive indulgence leads to disability, such disability will be considered the result of the person's willful misconduct. It may be helpful to an understanding of the policy to understand that Congress has never enjoyed the luxury of having unlimited funds with which to provide for gratuitous Veterans Administration benefits. In fact, the

Public Law by which Congress initially authorized the President of the United States to promulgate Veterans Administration regulations, Public Law 73-2, was entitled "An Act to maintain the credit of the United States Government." Thereafter, President Franklin D. Roosevelt promulgated old Veterans Regulation No. 10, precursor of current regulations, mandating that a disability would be held to have resulted from misconduct when it was "...by an act contrary to the principles of good morals; or as a result of gross negligence, gross carelessness, alcoholism, drug addiction, self-infliction of wounds, etc." (Emphases supplied) Since then, a distinction has been maintained between fortuitously incurred disease or disability, for which gratuitous Veterans administration benefits may be afforded, and other nonfortuitous disabili-

ities incurred at the hands of the claimant himself/herself. Alcoholism is not singled out for special consideration; other disabilities may be considered the result of willful misconduct, under appropriate circumstances. Whether the illness is question is alcoholism or some other disability, the Veterans Administration evaluates the circumstances of each individual in determining willful misconduct.

In the final analysis, we find no obvious error in the prior determination, which is affirmed.

#### FINDINGS OF FACT

1. In December 1980, it was held by a unanimous decision of a section of the Board of Veterans Appeals that entitlement of the veteran to educational assistance benefits under Chapter 34, Title 38,

United States Code, beyond the delimiting date was not established.

2. The December 1980 decision of the Board is reasonably supportable on the evidence then of record and was in accordance with the applicable laws and regulations.

#### CONCLUSION OF LAW

The decision of the Board of Veterans Appeals in December 1980, denying entitlement to educational assistance allowance benefits beyond the delimiting date under Chapter 34, Title 38, United States Code, involved no obvious error of a reversible nature, and that decision is final. (38 U.S.C. 1662, 4003, 4004; 38 C.F.R. 3.1, 3.301, 19.148, 21.1042, 21.1043)

#### DECISION

Entitlement to educational assistance allowance benefits under Chapter 34, Title 38, United States Code, beyond the delimiting date is not established. Accordingly, the benefit sought on reconsideration remains denied.

S/ John E. Siemens

S/ Robert L. Simpson, M.D

S/ Warren W. Rice, Jr.

S/ E.M. Krenzer

S/ Eugene A. O'Neill

S/ James J. Butler

## APPENDIX H

Veterans Benefits Law  
Statutory Provisions

38 U.S.C. §211(a) (1982 and Supp. II 1984):

§211. Decisions by Administrator;  
Opinions of Attorney General.

(a) On and after October 17, 1940, except as provided in sections 775, 784, and as to matters arising under chapter 37 of this title, the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

Pub. L. 91-376, §8(a), 84 Stat. 787, 790 (1970).

38 U.S.C. §1662(a)(1) (1982 and Supp. II 1984):

§1662. Time limitations for completing a program of education

(a)(1) No education assistance shall be afforded an eligible veteran under this chapter beyond the date 10 years after the veteran's last discharge or release from active duty...; except that, in the case of any eligible veteran who was prevented from initiating or completing such veteran's chosen program of education within such time period because of a physical or mental disability which was not the result of such veteran's own willful misconduct, such veteran shall, upon application, be granted an extension of the applicable delimiting period for such length



of time as the Administrator determines, from the evidence, that such veteran was prevented from initiating or completing such program of education.

G.I. Bill Improvement Act of 1977, Pub. L. 95-202, Title II, §203(a)(1), 91 Stat. 1439 (1977) (prior to 1980 amendment). (The current version of this section is set out in 38 U.S.C. §1662(a)(1) (1982 and Supp. II 1984)).

38 U.S.C. §4004 (1982 and Supp. II 1984):

§4004. Jurisdiction of the Board

(a) All questions on claims involving benefits under the laws administered by the Veterans' Administration shall be subject to one review on appeal to the Administrator. Final decisions on such appeals shall be made by the Board.

(b) When a claim is disallowed by the Board, it may not thereafter be reopened and allowed, and no claim based upon the same factual basis shall be considered; however, where subsequent to disallowance of a claim, new and material evidence in the form of official reports from the proper service department is secured, the Board may authorize the reopening of the claim and review of the former decision.

(c) The Board shall be bound in its decisions by the regulations of the Veterans' Administration, instructions of the Administrator, and the precedent opinions of the chief law officer.

(d) The decisions of the Board shall be in writing and shall contain findings of fact and conclusions of law separately stated.

Pub. L. 85-857, 72 Stat. 1241 (1958) (as amended by Pub. L. 87-97, §1, 75 Stat. 215 (1961)).

# APPENDIX I

## Rehabilitation Act of 1973 Statutory Provisions

Section 7(6) of the Rehabilitation Act of 1973, 29 U.S.C. §706(7) (1982) (as amended by Pub. L. 95-602, Title I, §122(a)(6), 92 Stat. 2984, 2985 (1978)):

### §706. Definitions

...(A) Except as otherwise provided in subparagraph (B), the term "handicapped individual" means any individual who (i) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (ii) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to subchapters I and III of this chapter.

(B) Subject to the second sentence of this subparagraph, the term "handicapped individual" means, for purposes of subchapters IV and V of this chapter, any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. For purposes of sections 793 and 794 of this title as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse,

would constitute a direct threat to property or the safety of others.

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (1982) (as amended by Pub. L. 95-602, Title I, §§ 119, 122 (d)(2), 92 Stat. 2982, 2987 (1978)):

§ 794. Nondiscrimination under Federal grants and programs; promulgation of rules and regulations

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive Agency or by the United States Postal Service. The head of

each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

Section 505 of the Rehabilitation Act of 1973, 29 U.S.C. §794a (1982) (as added by Pub. L. 95-602, Title I, §120, 29 Stat. 2982 (1978)):

§ 794a. Remedies and attorney fees

(a)(2) The remedies, procedures, and rights set forth in title VI of

the Civil Rights Act of 1964 [42 U.S. C.A. §2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.



## APPENDIX J

## Other United States Code Provisions

Administrative Procedure Act, 5 U.S.C.  
§701 (1982 and Supp. II 1984):

§701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that --

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

Administrative Procedure Act, 5 U.S.C.  
§702 (1982 and Supp. II 1984)

§702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review

thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief thereon be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judi-

cial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

28 U.S.C. §1331 (1982):

§1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. §2201 (1982 and Supp. II 1984)

§2201. Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than

actions brought under section 7428 of the Internal Revenue Code of 1954 or a proceeding under section 505 or 1146 of title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

## APPENDIX K

**Veterans' Administration Regulations  
Concerning "Willful Misconduct" and  
"Alcoholism"**

38 C.F.R. §3.1(n) (1985):

"Willful misconduct" means an act involving conscious wrongdoing or known prohibited action (malum in se or malum prohibitum). A service department finding that injury, disease or death was not due to misconduct will be binding on the Veterans Administration unless it is patently inconsistent with the facts and the requirements of laws administered by the Veterans Administration.

(1) It involves deliberate or intentional wrongdoing with knowledge of or wanton and reckless disregard of its probable consequences.

(2) Mere technical violation of police regulations or ordinances will not per se constitute willful misconduct.

(3) Willful misconduct will not be determinative unless it is the proximate cause of injury, disease or death.

38 C.F.R. §3.301(c) (2) (1985):

(c) Specific applications. For the purpose of determining entitlement to service-connected and nonservice-connected benefits the definitions in § 3.1(m) and (n) apply except as modified within the following paragraphs. The provisions of paragraphs (c) (2) and (3) of this section are subject to the provisions of § 3.302 where applicable.

\* \* \* \*

(2) Alcoholism. The simple drinking of alcoholic beverage is not of itself willful misconduct. The deliberate drinking of a known poisonous substance or under conditions which would raise a presumption to that effect will be considered willful misconduct. If, in the drinking of a beverage to enjoy its intoxicating effects, intoxication results approximately [sic] and immediately in disability or death, the disability or death will be considered the result of the person's willful misconduct. Organic diseases and disabilities which are a secondary result of the chronic use of alcohol as a beverage, whether out of compulsion or otherwise, will not be considered of willful misconduct origin.

#### APPENDIX L

Administrator's Decision, Veterans' Administration No. 988 (August 13, 1964), entitled "Subject: Interpretation of the Term 'Willful Misconduct' As Related to the Residuals of Chronic Alcoholism."

QUESTION PRESENTED: Whether changes should be made in the criteria currently followed for determining when disability or death is the result of the veteran's own willful misconduct because of use of alcohol as a beverage.

COMMENTS: Statutes currently authorizing disability and death compensation, dependency and indemnity compensation, and pension benefits preclude payment of such benefits when it is determined that the disability or death is the result of the veteran's own willful misconduct. See for example 38 U.S.C. 105, 310, 410(a) and 521(a). The provisions thereof re-



specting willful misconduct are similar to corresponding ones in earlier statutes previously in effect for many years. See section 300 of the former War Risk Insurance Act and section 200 of the former World War Veterans' Act, 1924. Of note also are similar provisions in the former Veterans' Regulation No. 10, with respect to benefits under Public No. 2, 73d Congress.

Criteria now applicable generally for determining when disability or death is the result of misconduct because of the use of alcohol as a beverage are set out in Administrator's Decision No. 2 promulgated March 21, 1931. Such general criteria are summarized in paragraph 14.04c of M21-1, in part, as follows:

"Basic principles for application in deciding cases involving alcoholism are stated in Administrator's Decision

No. 2, under which a finding of willful misconduct is to be made where a veteran drinks a poisonous beverage (methyl alcohol), knowing it to be poisonous or under circumstances that would raise a presumption to that effect, or when he drinks any alcoholic beverage for the purpose of enjoying its intoxicating effects and indulges to such an extent that his excessive indulgence results in a disease or disability. Excessive indulgence is not confined to the cases of chronic alcoholics and the fact that a veteran was not a chronic alcoholic is not material. The question involved is: Was there excessive indulgence and was it the proximate cause of the injury or disease in question."

In the present VA Regulation 1001(N) it is said that willful misconduct "means an act involving conscious wrongdoing or known prohibited action"; and that "it involves deliberate or intentional wrongdoing with knowledge of or wanton and reckless disregard of its probable consequences." The regulation provides further that "willful misconduct will not be determinative unless it is the proximate cause of injury, disease or death."

The injurious effects of drinking alcohol may be placed generally into two distinct groups:

(a) The proximate and immediate effects consisting of disabling injuries or death resulting from a state of intoxication, and,

(b) The remote, organic secondary effects of the continued use of alcohol

resulting in impairment of body organs or systems leading to disability or death.

One can, and very reasonably should, be held responsible for the extent and degree of his own drunkenness on individual occasions. So, to willingly achieve a drunken state and while in this condition to undertake tasks for which his condition renders him physically and mentally unqualified, is to act "with wanton and reckless disregard" of the probable consequences of drinking. Such, of course, is willful misconduct. In misconduct determinations, however, with respect to mental disorders where the use of alcohol as a beverage has been involved, a distinction has heretofore been recognized between alcoholism as a primary condition (or as secondary to an underlying personality disorder), and alcoholism as secondary to and a manifestation of an acquired

psychiatric disorder. If the latter condition is found the resulting disability or death is not to be considered as willful misconduct.

The principle thus recognized is applicable to other than mental disorders. With common social acceptance of the use of alcohol as a beverage, onset of the secondary condition may be very insidious in its development. Under such circumstances the development of the secondary condition does not meet the definition of intentional wrongdoing with knowledge or wanton disregard of its probable consequences. Secondary results are not the usual and probable effects of drinking alcohol as a beverage. By the time there is sufficient awareness of any probable deleterious consequences, the process has developed to a point where it is irreversible without professional help. At such

time, the person by himself, may lack the capacity to avoid the continued use of alcohol. While it is proper to hold a person responsible for the direct and immediate results of indulgence in alcohol, it cannot be reasonably said that he expects and wills the disease and disabilities which sometimes appear as secondary effects. These may range from cirrhosis of the liver to gastric ulcer, peripheral neuropathy, vitamin deficiency, chronic brain syndrome or simply acceleration of debility of age. These diseases also appear in the population without any relation to alcohol. Such resulting secondary conditions may properly be excluded in the criteria respecting willful misconduct without doing harm to the language or intent of the applicable statutes.

It should be noted, further, that, historically, the question of willful misconduct has never been raised in other related situations where personal habits or neglect are possible factors in the incurrence of disability. For example, the harmful effects of tobacco smoking on circulation and respiration were known long before tobacco was incriminated as a causative factor in the high incidence of cancer, emphysema and heart disease. Yet smoking has not been considered misconduct. It is unreasonable and illogical to apply one set of rules with respect to alcohol and a different one in a situation closely analogous.

HELD: Current criteria concerning the use of alcohol as a beverage and its consequences will be continued except that organic diseases and disabilities which are a secondary result of the chronic use

of alcohol as a beverage, whether out of compulsion or otherwise, will not be considered of willful misconduct origin. Administrator's Decision No. 2 is modified accordingly.

This opinion is hereby promulgated for observance by all officers and employees of the Veterans' Administration.

/S/ J. S. Gleason, Jr.  
Administrator



## APPENDIX M

Excerpts from Eugene Traynor's Statement on Appeal to Board of Veterans' Appeals (Appeal of Eugene Traynor, SS 091-34-0921, 306/212a, dated April 20, 1980)

THE DECISION IN THE [VA'S] STATEMENT OF CASE IS WRONG IN FACT AND IN LAW. IT HOLDS THAT EXCESSIVE DRINKING WAS "WILFUL MISCONDUCT" ON MR. TRAYNOR'S PART AND THEREFORE THAT HE CANNOT CLAIM ANY RELIEF BECAUSE OF HIS ALCOHOLISM.

Alcoholism is a disease, not wilful misconduct.

\* \* \* \*

The U.S. Rehabilitation Act of 1973, Section 503 [sic], prohibits any agency of the federal government from discriminating against the handicapped, and the category of handicapped persons has been construed to include alcoholics.

The import of this Act is that no federal entity, including the Veterans Administration, can take the position taken in

this case. The VA cannot hold that alcoholism is "wilful misconduct"; the VA must find that alcoholism is a disease like any other which would permit the veteran to delay the commencement of his educational benefits until his recovery permitted.

The above statement was formulated by me with my attorney, Shepherd I. Raimi of 608 Fifth Avenue, New York, New York 10020, (212) 586 3590. He is my "representative" in this matter.

Dated: New York, New York

April 20, 1980

/S/ EUGENE J. TRAYNOR

# **OPPOSITION BRIEF**

Supreme Court, U.S.

FILE

17  
FEB 20 1987

Nos. 86-622 and 86-737

CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1986

EUGENE TRAYNOR, PETITIONER

v.

THOMAS K. TURNAGE, ADMINISTRATOR OF VETERANS  
AFFAIRS AND VETERANS ADMINISTRATION

JAMES P. MCKELVEY, PETITIONER

v.

THOMAS K. TURNAGE, ADMINISTRATOR OF VETERANS  
AFFAIRS AND VETERANS ADMINISTRATION

ON PETITIONS FOR WRITS OF CERTIORARI TO THE  
UNITED STATES COURTS OF APPEALS FOR THE  
SECOND AND DISTRICT OF COLUMBIA CIRCUITS

**BRIEF FOR RESPONDENTS IN OPPOSITION**

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21 pp

#### QUESTIONS PRESENTED

1. Whether 38 U.S.C. 211(a) precludes judicial review of a decision by the Veterans Administration denying a veteran's application to extend the statutory period within which the veteran may receive educational benefits.
2. Whether, if we assume that judicial review is not barred, the denial of benefits in these cases violated the Rehabilitation Act, 29 U.S.C. 794.



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# In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-622

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BRIEF FOR RESPONDENTS IN OPPOSITION

## OPINIONS BELOW

The opinion of the court of appeals in No. 86-622 (Pet. App. 1a-38a) is reported at 791 F.2d 226. The opinion of the district court in No. 86-622 (Pet. App. 39a-82a) is reported at 606 F. Supp. 391. The opinion of the court of appeals in No. 86-737 (Pet. App. 1a-31a) is reported at 792 F.2d 194. The opinion of the district court in No. 86-737 (Pet. App. 32a-47a) is reported at 596 F. Supp. 1317.

## JURISDICTION

The judgment of the court of appeals in No. 86-622 was entered on May 16, 1986. A petition for rehearing was denied on July 15, 1986 (Pet. App. 86a-87a). The petition

for a writ of certiorari was filed on October 14, 1986 (a Tuesday following a legal holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

The judgment of the court of appeals in No. 86-737 was entered on May 30, 1986. A petition for rehearing was denied on August 7, 1986 (Pet. App. 49a). The petition for a writ of certiorari was filed on November 5, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

#### STATUTORY AND REGULATORY PROVISIONS INVOLVED

38 U.S.C. 211(a) provides, in pertinent part:

On and after October 17, 1940, except as provided in sections 775, 784, and as to matters arising under chapter 37 of this title, the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

Section 203 of the G.I. Bill Improvement Act of 1977, Pub. L. No. 95-202, Tit. II, 91 Stat. 1439, 38 U.S.C. (Supp. I 1977) 1662 provided, in pertinent part:

(a)(1) No educational assistance shall be afforded an eligible veteran under this chapter beyond the date 10 years after the veteran's last discharge or release from active duty after January 31, 1955; except that, in the case of any eligible veteran who was prevented from initiating or completing such veteran's chosen program of education within such time period because of a physical or mental disability which was not the result of such veteran's own willful misconduct, such veteran shall, upon application, be

granted an extension of the applicable delimiting period for such length of time as the Administrator determines, from the evidence, that such veteran was prevented from initiating or completing such program of education.

\* \* \* \* \*

(e) No educational assistance shall be afforded any eligible veteran under this chapter or chapter 36 of this title after December 31, 1989.

38 C.F.R. 3.301(c)(2) provides:

*Alcoholism.* The simple drinking of alcoholic beverages is not of itself willful misconduct. The deliberate drinking of a known poisonous substance or under conditions which would raise a presumption to that effect will be considered willful misconduct. If, in the drinking of a beverage to enjoy its intoxicating effects, intoxication results approximately and immediately in disability or death, the disability or death will be considered the result of the person's willful misconduct. Organic diseases and disabilities which are a secondary result of the chronic use of alcohol as a beverage, whether out of compulsion or otherwise, will not be considered of willful misconduct origin.

#### STATEMENT

1. The Veterans Benefits Law authorizes the payment of educational benefits to veterans within ten years following the date of discharge. No educational assistance may be paid after that ten-year period expires unless the veteran was unable to pursue an education within that period "because of a physical or mental disability which was not the result of such veteran's own willful misconduct." 38 U.S.C. 1662(a)(1). In the cases presently before the Court, petitioners are veterans who did not receive full



educational benefits during their respective ten-year periods. In each case, petitioner sought to extend his period of eligibility, contending that he was disabled during part of the ten-year period because of alcoholism. The Veterans Administration (VA) denied extensions to both petitioners in accordance with its longstanding policy that alcoholism not resulting from an underlying psychiatric disorder constitutes "willful misconduct."

The applicable VA regulation (38 C.F.R. 3.301(c)(2)), promulgated in 1972, was designed to incorporate principles set forth in greater detail in a 1964 VA administrative decision. 38 Fed. Reg. 20335-20336 (1972) (proposed regulation); 37 Fed. Reg. 24662 (1972) (final regulation).<sup>1</sup> The 1964 administrative decision, drawing on VA benefits decisions dating back to 1931, distinguishes between "primary" alcoholism and alcoholism that is "secondary to and a manifestation of an acquired psychiatric disorder" (Administrator's Decision, Veterans Administration No. 988, Interpretation of the Term "Willful Misconduct" As Related To The Residuals of Chronic Alcoholism (Aug. 13, 1964) (86-622 Pet. App. 139a, 143a-144a)). Such "secondary" alcoholism is not considered willful misconduct (*id.* at 144a). Nor does the 1964 VA decision regard as the product of willful misconduct any organic disorder caused by chronic alcoholism, such as cirrhosis of the liver. "While it is proper to hold a person responsible for the direct and immediate results of indulgence in alcohol, it cannot be reasonably said that he expects and *wills* the disease and disabilities which sometimes appear as secondary effects." *Id.* at 145a (emphasis in original).

<sup>1</sup> A companion provision (38 C.F.R. 3.301(c)(3)) establishes similar standards for determining when drug usage constitutes willful misconduct.

2. *No. 86-622*: Traynor was discharged from the Army on August 27, 1969. He entered college in 1977 and received veterans' education assistance benefits until those benefits were terminated when his ten-year period of eligibility expired on August 27, 1979. Traynor, who had used nine and one-half of the 24 months of benefits available to him (based on length of service), sought to have his period of eligibility for benefits extended. He contended that he had been unable to utilize his full benefits within ten years of discharge because he had suffered from alcoholism for 15 years ending in 1974.

During the administrative proceedings, Traynor asserted that the VA regulation setting forth the circumstances in which alcoholism constitutes willful misconduct is violative of the Rehabilitation Act, 29 U.S.C. 794. The Board of Veterans Appeals did not expressly adjudicate that statutory claim, noting that it was bound by VA regulations. The Board did, however, explain that the consistent VA policy (86-622 Pet. App. 117a) is:

[t]hat alcoholism can and should be considered an illness for purposes of medical treatment and rehabilitation, and that the simple drinking of any alcoholic beverage is not in and of itself willful misconduct. On the other hand, if in the consumption of alcohol for the purpose of enjoying its intoxicating effects excessive indulgence leads to disability, such disability will be considered the result of the person's willful misconduct.

Noting that "Congress has never enjoyed the luxury of having unlimited funds with which to provide for gratuitous Veterans Administration benefits," the Board explained that historically benefits have not been granted for a disability that results from willful misconduct (*id.* at 117a-118a). The Board observed that alcoholism has been



regarded as potentially disqualifying misconduct ever since the earliest veterans regulations promulgated by President Roosevelt. It added that (*id.* at 118a-119a):

Since then, a distinction has been maintained between fortuitously incurred disease or disability, for which gratuitous Veterans Administration benefits may be afforded, and other nonfortuitous disabilities incurred at the hands of the claimant himself/herself. Alcoholism is not singled out for special consideration; other disabilities may be considered the result of willful misconduct, under appropriate circumstances. Whether the illness i[n] question is alcoholism or some other disability, the Veterans Administration evaluates the circumstances of each individual in determining willful misconduct.

Finding no error in its prior determination that the facts of this case warranted a finding of willful misconduct, the Board denied Traynor's request for benefits beyond the delimiting date.

Traynor then filed suit in the United States District Court for the Southern District of New York. He alleged that the VA decision was violative of the Rehabilitation Act, the Due Process Clause and the Equal Protection component of the Fifth Amendment. The district court held that "[s]ince [the complaint] requires us to examine constitutional and statutory questions and not merely issues of VA policy, we conclude, in accordance with the Supreme Court's holding in *Johnson v. Robison*, 415 U.S. 361 (1974)], that we are not precluded from exercising our jurisdiction in this matter by 38 U.S.C. § 211(a)." 86-622 Pet. App. 58a-59a. On the merits, the district court rejected the constitutional challenge (*id.* at 59a-64a), but held that the VA decision violated the Rehabilitation Act. The court held that alcoholism is a handicap covered by

the Rehabilitation Act (*id.* at 69a-72a), and that the denial of benefits constitutes discrimination against alcoholics forbidden by that Act.

The court of appeals for the Second Circuit reversed. The panel majority held that judicial review of the Rehabilitation Act issue was precluded by 38 U.S.C. 211(a). The court stated (86-622 Pet. App. 16a-17a) that although "many veterans have in the service of our country suffered injuries that qualify them as 'handicapped individual[s]' for purposes of Section 504 [of the Rehabilitation Act] \* \* \* Congress did not delineate any exception to section 211(a) for 'handicapped' veterans when it passed section 504." Thus, the court explained, there was no basis for concluding that Congress intended "to grant to 'handicapped' veterans the judicial review traditionally denied all other veterans." 86-622 Pet. App. 17a.

Judge Kearse dissented on the jurisdictional issue.<sup>2</sup> In her view, Section 211(a) does not bar judicial review because the Rehabilitation Act neither provides benefits to veterans nor is it administered by the VA (86-622 Pet. App. 32a). In addition, Judge Kearse deemed Section 211(a) to be inapplicable here because there was no decision of the Administrator on the Rehabilitation Act issue, the Board of Veterans Appeals having "refused, on the ground of lack of authority, to decide whether the challenged regulations violated the Rehabilitation Act" (86-622 Pet. App. 36a).

3. *No. 86-677*: Petitioner McKelvey was discharged from the Army in September 1966. During the next nine years he was hospitalized at various times for alcoholism and associated conditions. He did not apply for veteran's educational benefits until more than 10 years had elapsed following his discharge. The VA, finding "no evidence that an acquired psychiatric disease preceded [McKelvey's]

<sup>2</sup> She expressed no view on the merits (86-622 Pet. App. 38a).

alcoholism" (86-737 Pet. App. 5a), denied his request to extend his period of eligibility and rejected his application for benefits.

McKelvey filed suit in the United States District Court for the District of Columbia. He challenged his denial of benefits on the ground that it was based on a misconstruction of the "willful misconduct" language of the veterans benefits statute. He contended also that the VA decision constituted discrimination against the handicapped in violation of the Rehabilitation Act, an argument he had not presented in the administrative proceedings.

The district court held that it had jurisdiction to consider McKelvey's claims, stating that Section 211(a) "does not prevent judicial review of challenges to the VA's authority to promulgate regulations." 86-737 Pet. App. 36a. On the merits, the district court held that the VA had properly interpreted the "willful misconduct" standard of the veterans' benefits statute. The court noted that when Congress enacted the educational benefits extensions, the VA interpretation of "willful misconduct" already existed (in connection with earlier provisions on disability compensation), and that Congress specifically expressed an intent that the same interpretation be used (*id.* at 40a, quoting S. Rep. 95-468, 95th Cong., 1st Sess. 69-70 (1977)). The district court reached a different conclusion on the Rehabilitation Act claim, holding that the VA interpretation constitutes discrimination against alcoholics in violation of Section 504. 86-737 Pet. App. 43a.

The court of appeals for the District of Columbia Circuit reversed. The court held that while Section 211(a) does not preclude judicial review of the Rehabilitation Act claim, petitioner's substantive statutory claim has no merit.

The court of appeals' decision on the jurisdictional issue rests on "the unusual, perhaps *sui generis* posture of this case" (86-737 Pet. App. 6a). The court focused on two

particular facts: first, that a veteran is challenging the validity of a regulation under the Rehabilitation Act, a legal issue the Board of Veterans Appeals regarded itself as lacking authority to decide, and second, that the VA had not otherwise made a determination on that issue prior to the filing of this lawsuit<sup>3</sup> (*id.* at 7a). Since, in the court's view, Section 211(a) is applicable only when a claim has been "resolved by an actual 'decision of the Administrator'" (*ibid.*, quoting *Johnson v. Robison*, 415 U.S. 361, 367 (1974)), it does not bar judicial review in these circumstances. The court emphasized "the narrowness of our holding" (86-737 Pet. App. 9a):

[W]e do not anticipate another occasion to review a VA order on the basis that supports our review today. The VA has now determined it does have authority to decide on the effect and applicability of federal statutes other than veterans' legislation when the agency acts on benefits claims. We therefore expect that the VA will not again regard as outside the arsenal of law it applies any potentially relevant congressional enactment.

On the merits, the court concluded that the VA could reasonably distinguish between those whose handicap was caused by their own willful misconduct, and those who are not responsible for their handicap. The VA's conclusion that alcoholics who cannot show an underlying psychiatric disorder are chargeable with willful misconduct reflects "general societal perceptions regarding personal responsibility." 86-737 Pet. App. 12a. Moreover, since

<sup>3</sup> In response to the court's request at oral argument, the General Counsel of the VA took the position that the Rehabilitation Act does not invalidate the VA's interpretation of the "willful misconduct" language in Section 1662. The court held, however, that the General Counsel's letter did not constitute a "decision of the Administrator" for purposes of Section 211(a), since it was written after the case started. 86-737 Pet. App. 7a-8a.



"[a]lcoholism, unlike any other disability except drug addiction \* \* \*, is self-inflicted \* \* \* [,] [i]t is therefore feasible for alcoholism, as it is not for all other disabilities except drug addiction, to make a generalized determination that willfulness exists unless there is established the singular exculpation for self-infliction (psychiatric disorder) that the agency has chosen to acknowledge" (*id.* at 16a).

In a separate opinion, Judge Ginsburg concurred in the court's holding that Section 211(a) does not bar judicial review in the unique circumstances of this case, and she dissented from the court's holding on the merits (86-737 Pet. App. 17a).

Judge Scalia also wrote separately. He dissented from the court's holding that Section 211(a) is not applicable, stating that the "decision of the Administrator" which Section 211(a) immunizes from judicial review necessarily includes all issues within the competence of the agency to decide, "whether or not [the agency] specifically adverts to, or is even aware of them—just as a court necessarily 'decides' all issues logically essential to the validity of its holding, whether or not it explicitly addresses or considers them." 86-737 Pet. App. 30a. Any other view of Section 211(a), he wrote, would enable "the Administrator \* \* \* to control the scope of judicial review of his determinations by simply designating which underlying issues he chooses not to decide" (86-737 Pet. App. 30a). Judge Scalia concurred in the court's decision on the merits, upholding the validity of the VA regulation.

#### ARGUMENT

The judgments of the courts of appeals are correct and do not conflict with any decision of this Court. Although the courts of appeals have not achieved complete uniformity in deciding the questions raised in these petitions, the alleged conflicts are neither as pervasive nor as important

as petitioners suggest. Accordingly, we do not believe that the present cases warrant an exercise of this Court's certiorari jurisdiction. Should the issues prove to be recurring, they will presumably arise in cases that are less idiosyncratic—and thus more appropriate for further review—than those now before the Court.

1. The petition in No. 86-622 raises the question whether 38 U.S.C. 211(a) precludes judicial review in these circumstances. While there is some tension among the courts of appeals on this issue, the extent to which there is a square conflict of authority is not entirely clear. The courts have generally accepted the principle stated in Section 211(a) and repeated by this Court, that "[j]udicial review of VA [benefits] decisions is precluded by statute." *Walters v. National Association of Radiation Survivors*, 473 U.S. 305, 307 (1985). The courts have articulated only two limited exceptions to the statutory bar on judicial review: where a challenge is made to the constitutionality of a statute (*Johnson v. Robison*, 415 U.S. 361 (1974)), and where a challenge to a VA policy is made, not by a party seeking benefits, but by a third party affected by the policy who has no opportunity to be heard in administrative proceedings.<sup>4</sup>

In situations where neither of these limited exceptions obtains, the general rule has prevailed, precluding judicial review of benefits decisions at the behest of the veteran. *E.g.*, *Barefield v. Byrd*, 320 F.2d 455 (5th Cir. 1963); *Milliken v. Gleason*, 332 F.2d 122 (1st Cir. 1964), cert.

<sup>4</sup> See, e.g., *Evergreen State College v. Cleland*, 621 F.2d 1002 (9th Cir. 1980); *University of Maryland v. Cleland*, 621 F.2d 98 (4th Cir. 1980); *Merged Area X (Education) v. Cleland*, 604 F.2d 1075 (8th Cir. 1979); *Wayne State University v. Cleland*, 590 F.2d 627 (6th Cir. 1978). These cases were not brought by veterans seeking review of denials of benefit claims. Rather, they were brought by "educational institutions interested in the overall administration of the VA educational benefits program" (86-622 Pet. App. 18a).

denied, 379 U.S. 1002 (1965); *Redfield v. Driver*, 364 F.2d 812 (9th Cir. 1966); *Fritz v. Director of Veterans Administration*, 427 F.2d 154 (9th Cir. 1970); *Wickline v. Brooks*, 446 F.2d 1391 (4th Cir. 1971), cert. denied, 404 U.S. 1061 (1972); *Ross v. United States*, 462 F.2d 618 (9th Cir. 1972); *De Rodulfa v. United States*, 461 F.2d 1240 (D.C. Cir. 1972); *Holley v. United States*, 352 F. Supp. 175 (S.D. Ohio 1972), aff'd without opinion, 477 F.2d 600 (6th Cir. 1973); *Anderson v. VA*, 559 F.2d 935 (5th Cir. 1977); *Rosen v. Walters*, 719 F.2d 1422, 1424-1425 (9th Cir. 1983); *Pappanikolaou v. Administrator of the Veterans Administration*, 762 F.2d 8, 9 (2d Cir. 1985).

Petitioner attempts to avoid the preclusive effects of the statute by contending that he is challenging the validity of a regulation rather than the benefits decision in a particular case. Aside from the fact that petitioner does indeed challenge his individual benefits determination, no court of appeals has recognized the new exception to Section 211(a) petitioner proposes. Indeed, the only other court of appeals that has ruled conclusively on petitioner's proffered justification for judicial review has, like the Second Circuit, expressly rejected it. *Roberts v. Walters*, 792 F.2d 1109 (Fed. Cir. 1986).<sup>5</sup> The District of Columbia Circuit in *McKelvey* voiced no disagreement with the Second Circuit's decision in *Traynor*. It reached a different result only "[b]ecause of the unusual, perhaps *sui generis*,

<sup>5</sup> The cases petitioner alleges to be in conflict with the decision of the Second Circuit below are all distinguishable (see 86-622 Pet. 27 n.1). In *Tinch v. Walters*, 765 F.2d 599 (1985), the Sixth Circuit reached the merits of a veteran's contention that 38 C.F.R. 3.301(c)(2) violates the Rehabilitation Act, but the court did not address the question whether Section 211(a) precluded judicial review. It therefore cannot be predicted how the Sixth Circuit would rule if it were to face that issue. Compare *Holley v. United States*, *supra*, with *Wayne State University v. Cleland*, *supra*. The remaining cases upon which petitioner relies did not involve claims by veterans challenging denials of benefits (see note 4, *supra*).

posture" of the case before it, expressly disclaiming "a definitive decision on the breadth" of Section 211(a) and stating that "we do not anticipate another occasion to review a VA order on the basis that supports our review today" (86-737 Pet. App. 6a, 9a).

Even if there were a clear conflict among the courts of appeals, the present cases involve singular facts that would diminish the precedential value of any decision by this Court on the scope of Section 211(a).<sup>6</sup> Accordingly, further review is not warranted.

2. a. Both petitions raise the substantive question whether petitioners are entitled to extend their periods of eligibility for benefits under 38 U.S.C. 1662(a).<sup>7</sup> Although a conflict exists on this issue between the decision of the District of Columbia Circuit in *McKelvey* and the decision of the Sixth Circuit in *Tinch v. Walters*, 765 F.2d 599 (1985), the limited prospective impact of that conflict leads us to conclude that review is not warranted.<sup>8</sup>

Subsection (e) of Section 1662 provides that "[n]o educational assistance shall be afforded any eligible veteran under this chapter \* \* \* after December 31, 1989." In view of the impending expiration of the program, we concur in petitioner McKelvey's prediction that cases under this program "may not arise in the future." 86-737

<sup>6</sup> In neither case now before the Court did the VA address the merits of the statutory claim presented for judicial review. These cases are therefore cluttered with two threshold questions: whether the VA may consider such statutory claims and whether there was any "decision[] of the Administrator" on the merits of the issue on which judicial review is sought. Future cases should not be so burdened. The court of appeals in *McKelvey* instructed the VA "not [to] regard as outside the arsenal of law it applies any potentially relevant congressional enactment." 86-737 Pet. App. 9a.

<sup>7</sup> The Second Circuit of course did not reach this issue in light of its holding under Section 211(a).

<sup>8</sup> The government did not file a petition for a writ of certiorari in *Tinch*.



Pet. 12 n.8.<sup>9</sup> Even at present, the question raised here will affect only a few cases involving that program. The VA advises that in the past two years only 13 veterans have sought on account of alcoholism to extend the period within which they may receive educational benefits.<sup>10</sup> Moreover, since the educational benefits extension legislation has several unique features that will affect the analysis of the Rehabilitation Act issue, it is questionable whether a decision in these cases would be dispositive in cases arising under other programs of more general application.

b. Like every other qualified veteran—handicapped and non-handicapped, alcoholic and non-alcoholic—each petitioner had a ten-year period of eligibility for educational benefits.<sup>11</sup> Persons in petitioners' circumstances therefore had some meaningful access to the relevant benefit. Cf. *Alexander v. Choate*, 469 U.S. 287, 301-306 (1985) (Rehabilitation Act is not violated by state Medicaid rule that had disparate impact on the handicapped). There is no claim that any action, regulation or decision by the VA denied benefits to petitioners during the statutory delimiting period, much less that any such denial constituted discrimination violative of the Rehabilitation Act. Rather, these cases are confined to the contention

<sup>9</sup> Because of the relatively small number of cases arising under 38 U.S.C. 1662(a) that would be affected by the issue in this case (see note 10, *infra*), the potential absence of nationwide uniformity should not impose substantial inconvenience in administering this program until its expiration in 1989.

<sup>10</sup> The VA informs us that since 1979 (two years following adoption of the extension legislation), the Board of Veterans Appeals has decided the following numbers of cases involving alcoholics seeking extensions of the ten-year post-discharge period for utilizing educational benefits under 38 U.S.C. 1662(a): 1979—20; 1980—26; 1981—14; 1982—13; 1983—16; 1984—15; 1985—3; 1986—10).

<sup>11</sup> Petitioner Traynor in fact received veterans' educational benefits during that period.

that petitioners are entitled to have their eligibility periods extended—a privilege that is not available to non-disabled veterans. As the District of Columbia Circuit recognized (86-737 Pet. App. 11a n.2), petitioners' claim differs from the issue that more commonly arises under the Rehabilitation Act, *viz.*, whether discrimination exists between handicapped individuals and others. Here, petitioners' claim is one of "discrimination between various categories of handicapped individuals." *Ibid.*; see *Colin K. v. Schmidt*, 715 F.2d 1, 9 (1st Cir. 1983).<sup>12</sup>

c. In Section 1662(a) Congress chose to extend the period of eligibility for federal benefits only to those disabled veterans whose disabilities were not caused by their own willful misconduct. In so doing, Congress drew on a long line of similar enactments and a consistent history of VA interpretation. For many years Congress has provided a "willful misconduct" exception to veterans' eligibility for service-connected disability compensation (see 38 U.S.C. 310; 86-622 Pet. App. 118a). In 1964, in a case arising under the disability compensation program, the VA explained in detail its interpretation of "willful misconduct" as applied to alcoholism, an interpretation that has roots in cases dating back to 1931. It was against this background that Congress in 1977 adopted the "willful misconduct" standard for educational benefits extensions (38 U.S.C. 1662(a)(1)). The Senate Veterans Affairs Committee stated that "[i]n determining whether the disability sustained was the result of the veterans' own 'willful misconduct,' the Committee intends that the same standards be applied as are utilized in determining eligibility for other VA programs under title 38." S. Rep. 95-468,

<sup>12</sup> The facts of the present cases are even more rarefied. Since petitioners are now able to pursue educational programs, their Rehabilitation Act claim is that they are now being discriminated against solely on account of a past disability. There is no claim that they are the victims of present discrimination because of a present disability.

95th Cong., 1st Sess. 69-70 (1977). Indeed, the Senate Report expressly refers to the VA policy involved here (which has not been changed since 1977).<sup>13</sup>

In light of this plain statutory language and legislative history, the VA's continued adherence to the interpretation expressly approved in the Senate Report was surely faithful to congressional intent.<sup>14</sup>

d. Petitioners do not quarrel with Congress's authority to exclude from the scope of the benefits-extension legislation those whose disability is the product of "willful misconduct." Moreover, as the District of Columbia Circuit recognized (86-737 Pet. App. 10a), petitioners

<sup>13</sup> The Senate Report cites VA Manual 21-1, § 14.04 (Jan. 29, 1976) (see C.A. App. 13 *et seq.*). Section 14.04c states that "[b]asic principles for application in deciding cases involving alcoholism are stated in Administrator's decision No. 988 \* \* \*." Administrator's Decision No. 988 is the administrative policy decision involved in this case. See 86-622 Pet. App. 139a-147a.

<sup>14</sup> There is no merit to petitioners' contention that the 1977 legislation was superseded by Congress's action in 1978 extending the Rehabilitation Act to federal agencies. The 1978 amendment to the Rehabilitation Act made no reference to the veterans' benefits program. Repeals by implication are not favored, especially where the later statute is general and the earlier statute is specific. *Radzanower v. Touche, Ross & Co.*, 426 U.S. 148, 153 (1976); *Morton v. Mancari*, 417 U.S. 535, 550-551 (1974); *Silver v. NYSE*, 373 U.S. 341, 357 (1963).

At all events, the Rehabilitation Act does not require the VA to make the extension provision available to all veterans or even to all disabled veterans. Under regulations implementing the Rehabilitation Act promulgated by the Secretary of Health and Human Services, "the exclusion of a specific class of handicapped persons from a program limited by Federal statute or executive order to a different class of handicapped persons is not prohibited \* \* \*" (45 C.F.R. 84.4(c); see also 28 C.F.R. 41.51(c)). This Court has stated that the Secretary's regulations constitute "an important source of guidance on the meaning of § 504." *Alexander v. Choate*, 469 U.S. at 304 n.24; *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984); *Southeastern Community College v. Davis*, 442 U.S. 397, 413 (1979).

"presumably \* \* \* would not object to a VA regulation that stated nothing more than, 'those alcoholics whose alcoholism is attributable to their own willful misconduct are ineligible for educational benefits extensions.'" Since petitioners do not contend that alcoholism can never be willful misconduct under the statute, these cases are reduced either to the essentially factual question whether petitioners' alcoholism constituted willful misconduct, or to the narrow legal question whether the standard the VA has employed for decades, and that Congress has expressly approved, is a reasonable basis for determining when alcoholism is willful misconduct.

Given these circumstances, the present cases do not merit further review. Should the question whether the VA regulation violates the Rehabilitation Act arise in a context with broader programmatic significance—*e.g.*, disability benefits—the Court could decide at that time whether review is warranted.<sup>15</sup>

## CONCLUSION

The petitions for writs of certiorari should be denied.  
Respectfully submitted.

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FEBRUARY 1987

<sup>15</sup> A case involving disability benefits is presently pending in the Third Circuit. *Buck v. VA*, No. 86-1656.

# **JOINT APPENDIX**

MAY 28 1987

JOSEPH F. SPANIOL, JR.  
CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1986

EUGENE TRAYNOR,

*Petitioner,*

v.

THOMAS K. TURNAGE, ADMINISTRATOR OF VETERANS'  
AFFAIRS, and VETERANS' ADMINISTRATION,

*Respondents.*

JAMES P. MCKELVEY,

*Petitioner,*

v.

THOMAS K. TURNAGE, ADMINISTRATOR OF VETERANS'  
AFFAIRS, and VETERANS' ADMINISTRATION,

*Respondents.*

**On Writs of Certiorari to the United States  
Courts of Appeals for the Second Circuit and the  
District of Columbia Circuit**

**JOINT APPENDIX**

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May 28, 1987

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and Orders Not Included Herein

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No. 86-622

Opinion of the United States Court  
of Appeals for the Second Circuit,  
dated May 16, 1986 ..... 1a

Opinion of the United States District  
Court for the Southern District of  
New York, dated April 4, 1985.. 39a

Judgment and order of the United States  
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Opinion of the United States  
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No. 86-622

July 13, 1982 - Complaint filed in  
the United States  
District Court for  
the Southern District  
of New York

October 18, 1982 - Defendants' Answer  
filed

April 2, 1984 - Defendants' Motion  
to Dismiss or, in  
the Alternative, for  
Summary Judgment  
filed

April 4, 1984 - Plaintiff's Cross-  
Motion for Summary  
and Declaratory  
Judgment filed

April 4, 1985 - District Court  
opinion filed  
granting Plaintiff's  
Motion for Summary  
and Declaratory  
Judgment

June 6, 1985 - Judgment of District  
Court for plaintiff  
entered

August 1, 1985 - Notice of Appeal  
filed

May 16, 1986 - Judgment of United States Court of Appeals for the Second Circuit reversing the judgment of the District Court entered

July 15, 1986 - Order denying Petition for Rehearing and Suggestion for Rehearing En Banc filed

October 14, 1986 - Petition for Certiorari filed

March 9, 1987 - Certiorari granted

Chronological List of  
Relevant Docket Entries

No. 86-737

July 20, 1983 - Complaint filed in the United States District Court for the District of Columbia

September 27, 1983 - Defendant's motion to dismiss or, in the alternative, for summary judgment filed

October 26, 1983 - Plaintiff's cross-motion for summary judgment and memorandum in support thereof filed

October 19, 1984 - Memorandum Opinion and Order of District Court filed, granting plaintiff's motion for summary judgment in part and invali-

dating 38  
C.F.R.  
§ 3.301(c)(2)  
as discrimina-  
tory in viola-  
tion of § 504  
of the Re-  
habilitation  
Act, 29 U.S.C.  
§ 794, and  
remanding the  
case to the VA  
for determina-  
tion of whether  
plaintiff is  
entitled to  
benefits

December 13, 1984 - Notice of  
Appeal filed

May 30, 1986 - Judgment of the  
United States  
Court of  
Appeals for the  
District of  
Columbia  
Circuit re-  
versing the  
judgment of the  
District Court  
entered

August 7, 1986 - Per curiam  
order denying  
appellee's  
petition for  
rehearing.

August 7, 1986 - Per curiam  
order, en banc,  
denying  
appellee's  
suggestion for  
rehearing en  
banc.

Nov. 5, 1986 - Petition for  
Certiorari  
filed

March 9, 1987 - Certiorari  
granted

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

- - - - - X  
EUGENE TRAYNOR, :  
Plaintiff, : COMPLAINT  
- against - : Civil Action  
: No. 82 Civ.  
ROBERT P. NIMMO, Adminis- : 4563  
trator of the Veterans' : (Cooper)  
Administration; and the :  
VETERANS' ADMINISTRATION, :  
Defendants. :  
- - - - - X

PRELIMINARY STATEMENT

1. This action is brought on behalf of an honorably discharged veteran who has been denied the veterans' educational assistance benefits to which he is entitled solely on the basis of a history of alcoholism, a disease from which he is now recovered.

2. Plaintiff's honorable tour of active duty in the armed services entitled him to veterans' educational assistance

benefits; he was unable to use these benefits to pursue his education for several years following his discharge because he was suffering from alcoholism. Following his recovery, he requested an extension of time in which to use his entitlement to benefits pursuant to Veterans' Benefits Law §1662(a). Section 1662(a) requires that extensions of time be granted to any veteran who, because of a disability that was not the result of his own willful misconduct, was prevented from pursuing his education during the time that veterans are normally allotted for using educational assistance benefits. Defendants have denied plaintiff an extension of time solely on the basis of a Veterans' Administration regulation that conclusively defines alcoholism as resulting from "willful misconduct."

3. Plaintiff challenges the regulation defendants applied to deny him the



extension of time to use the education benefits to which he was entitled on the grounds that:

A. It discriminates against veterans who are entitled to educational assistance benefits solely on the basis of their handicap of alcoholism, in violation of section 504 of the Rehabilitation Act of 1973 as amended in 1978, 29 U.S.C. §794;

B. By refusing to recognize alcoholism as a disability and conclusively defining it as resulting from willful misconduct, thus denying veterans with a history of alcoholism the benefits to which they are entitled under 38 U.S.C. §1662(a), it discriminates against a particular class of persons without rational justification in violation of the Fifth Amendment to the Constitution of the United States;

C. It was promulgated and is applied by defendants in excess of their statutory authority, without rational basis, and without observance of the procedures required by law, in violation of 38 U.S.C. §§105, 210(c)(1) and 1662(a) and 5 U.S.C. §§553, 701-706.

#### JURISDICTION

3. This is a civil action brought under 29 U.S.C. §794, which provides that no otherwise qualified handicapped individual shall, by reason of his handicap, be denied the benefits of, or be subjected to discrimination under any program or activity conducted by any Executive Agency; and under the Fifth Amendment to the Constitution of the United States. This action is also brought under 38 U.S.C. §§210(c)(1),

1662(a) and 5 U.S.C. §§553, 701-706, in that it challenges defendants' regulation concerning alcoholism as being promulgated without observance of the procedures required by law, without rational basis and in excess of defendants' statutory authority to administer the Veterans' Benefits Law. The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1331, 28 U.S.C. §1361, 28 U.S.C. §§2201 and 2202, and 29 U.S.C. §794(a)(2).

#### PARTIES

4. Plaintiff Eugene Traynor is an honorably discharged veteran who resides in New York State.

5. Defendant Veterans' Administration (VA) is that part of the executive branch responsible for administering the laws relating to veterans' benefits. 38

U.S.C. §201. The VA regional office which denied plaintiff's application for benefits is located in New York City.

6. Defendant Robert P. Nimmo is the Administrator of the VA and is sued in his official capacity. As Administrator, he is in charge of the VA, and is responsible for executing the laws relating to veterans' benefits and for promulgating regulations which are consistent therewith. 38 U.S.C. §210.

#### STATEMENT OF THE FACTS

7. Plaintiff received an honorable discharge from the armed services after serving on active duty from February 27, 1968 through August 27, 1969.

8. By virtue of his honorable tour of active duty, plaintiff became entitled to veterans' educational assistance

benefits under Chapter 34 of the Veterans' Benefits Law, 38 U.S.C. §1651, et seq.

9. From some time prior to his discharge through February 1974, plaintiff suffered from the disease of chronic alcoholism. As a result he drank compulsively and was ill every day, suffered from frequent internal bleeding (resulting in hematemesis), convulsive seizures, loss of consciousness and other disabling symptoms of alcoholism. During this period plaintiff was unable to hold a job for more than a few days, and was hospitalized five times for treatment of the convulsions, hematemesis, and other deleterious signs of alcoholism. He was initially diagnosed as suffering from alcoholism in 1970, and this diagnosis was reconfirmed each time he was hospitalized through 1974.

10. In February 1974 plaintiff joined Alcoholics Anonymous, stopped

drinking, and began recovering from alcoholism. By January 1976 he was able to obtain full-time employment. He has been steadily employed on a full-time basis since that time.

11. During the time plaintiff was suffering and recovering from chronic alcoholism, he was unable to initiate or pursue his college education.

12. By 1978, plaintiff had sufficiently recovered from alcoholism to be able to pursue his education. In the spring of 1978 he was admitted to City College of the City University of New York, and began taking courses at night while he continued to work full-time.

13. When plaintiff began attending college, he applied for and was determined to be entitled to veterans' educational assistance benefits.

14. Plaintiff received veterans' educational assistance for the first four

semesters that he attended college (the 1978 spring, summer and fall terms, and 1979 spring term).

15. In 1979, the VA notified plaintiff that his educational assistance benefits would be terminated as of August 27, 1979, ten years after the date he was discharged from active duty (his "delimiting date").

16. The Veterans' Benefits Law, 38 U.S.C. §1662(a), provides in pertinent part:

(a)(1) No education assistance shall be afforded an eligible veteran under this chapter beyond the date 10 years after the veteran's last discharge or release from active duty...except that, in the case of any veteran who was prevented from initiating or completing such veteran's chosen program of education within such time period because of a physical or mental disability which was not the result of such veteran's own willful misconduct, such veteran shall, upon application...be granted an extension of the applicable

delimiting period for such length of time as the Administrator determines, from the evidence, that such veteran was so prevented from initiating or completing such program of education.

17. The Veterans' Benefits Law defines "disability" for purposes of determining claims for veterans benefits as meaning "a disease, injury, or other physical or mental defect." 38 U.S.C. §601(1).

18. Alcoholism is a disability under the meaning of 38 U.S.C. §601(1) and 38 U.S.C. §1662(a).

19. Although the Veterans' Benefits Law nowhere defines what constitutes "willful misconduct," VA regulation §3.1(n) defines that term as follows:

(n) "Willful misconduct" means an act involving conscious wrongdoing or known prohibited action (malum in se or malum prohibitum). A service department finding that injury, disease or death was not due to misconduct will be binding on the Veterans



Administration unless it is patently inconsistent with the facts and the requirements of laws administered by the Veterans Administration.

(1) It involves deliberate or intentional wrongdoing with knowledge of or wanton and reckless disregard of its probable consequences.

(2) Mere technical violation of police regulations or ordinances will not per se constitute willful misconduct.

(3) Willful misconduct will not be determinative unless it is the proximate cause of injury, disease or death.  
(See §§3.301, 3.302.)

38 C.F.R. §3.1(n).

20. In May 1979 plaintiff applied for an extension of his delimiting date pursuant to 38 U.S.C. §1662(a) on the ground that his former condition of alcoholism was a disability that had prevented him from initiating or completing his education during his delimiting period. In support of this application, he submitted medical evidence that documented his history of alcoholism during the period for which he sought an

extension of time for receiving educational assistance benefits.

21. By letter dated August 21, 1979, the New York City Regional Office of the VA informed plaintiff that it had denied his application.

22. The sole basis for this decision was VA regulation §3.301(c)(2), which conclusively presumes alcoholism to be the result of "willful misconduct."

23. VA regulation §3.301(c)(2) provides that the general definition of "willful misconduct" set forth in ¶19, supra shall not apply in determining claims for certain veterans' benefits where alcoholism is concerned. Instead, it provides that the following rule shall govern such determinations:

(2) Alcoholism. The simple drinking of alcoholic beverage is not of itself willful misconduct. The deliberate drinking of a known poisonous substance or under conditions which would raise a presumption

to that effect will be considered willful misconduct. If, in the drinking of a beverage to enjoy its intoxicating effects, intoxication results approximately and immediately in disability or death, the disability or death will be considered the result of the person's willful misconduct. Organic diseases and disabilities which are a secondary result of the chronic use of alcohol as a beverage, whether out of compulsion or otherwise, will not be considered of willful misconduct origin.

38 C.F.R. §3.301(c)(2).

24. Although plaintiff had been hospitalized several times during the period for which he sought an extension of his delimiting date for treatment of secondary organic disorders caused by his chronic alcoholism, as set forth in ¶9, supra, the VA refused to grant him any extension of time for even those periods of hospitalization because of another VA regulation, 38 C.F.R. §21.1043(a), which provides that a veteran disabled for periods of 30 days or less will not be

considered to have been prevented from pursuing his education given the short duration of his disability. In applying VA regulation 21.1043(a), defendants refused to recognize alcoholism itself as a disability.

25. The VA terminated plaintiff's educational assistance benefits as of August 27, 1979. At that time, plaintiff had approximately fourteen and one-half months of educational assistance benefits remaining in his original entitlement.

26. Plaintiff appealed the initial decision denying him an extension of his delimiting date to the VA's Board of Veterans' Appeals in Washington, D.C. At a hearing held on August 1, 1980 plaintiff submitted additional evidence to the Board of Veterans' Appeals showing that alcoholism is recognized as a chronic

disease by the American Medical Association, the American Psychiatric Association and federal agencies, including the VA itself in its hospitals and rehabilitation programs, that persons afflicted with the disease drink compulsively and without control, and that such drinking and the consequent disabling effects are not the result of willful conduct.

27. On December 17, 1980 the Board of Veterans' Appeals denied plaintiff's appeal on the basis of VA regulation §3.301(c)(2).

28. Plaintiff sought reconsideration of this decision. On November 17, 1981 the Board of Veterans' Appeals issued its opinion on reconsideration, affirming its previous decision on the basis of VA regulation §3.301(c)(2). In this opinion, the Board refused to consider plaintiff's claims that regulation §3.301(c)(2)

violated the Fifth Amendment, the Rehabilitation Act, and the Veterans' Benefits Law, on the ground that 38 U.S.C §4004(c) limited the Board's jurisdiction and bound the Board to act in accordance with VA regulations and Veterans' Administrator's Decisions.

29. Since September 1979 plaintiff has continued to attend college at his own expense.

30. Defendants are required by 38 U.S.C. §210(c)(1) and by 5 U.S.C. §§553 and 701-706 to adopt regulations which do not exceed their statutory authority, and which are rationally related to statutory objectives. They are also required by 5 U.S.C. §553 and 38 C.F.R. §1.12 to promulgate regulations pursuant to the procedures set forth in the Administrative Procedure Act, 5 U.S.C. §551 et seq. Defendants have failed to fulfill these obligations.

31. The VA originally defined alcoholism as willful misconduct for purposes of determining claims for certain benefits under the Veterans' Benefits Law during Prohibition when the sale of alcohol was illegal (Veterans' Regulation No. 10 and Veterans' Administrator's Decision No. 2); it subsequently incorporated that definition of alcoholism in Veterans' Administrator's Decision No. 988, which was issued in 1964.

32. On information and belief, the definition of alcoholism as willful misconduct contained in Veterans' Administrator's Decisions Nos. 2 and 988 provided the sole basis for VA regulation §3.301 (c)(2) when defendants promulgated that regulation in 1972. On information and belief, regulation §3.301(c)(2) was not based on any studies or medical evidence regarding the nature of alcoholism.

33. VA regulation §3.301(c)(2) was promulgated in 1972 pursuant to Chapters 11 and 15 of the Veterans' Benefits Law, 38 U.S.C. §§310 and 521, which pertain to benefits for service-connected disabilities (known as "compensation") and to benefits for non-service-connected disabilities (known as "pension"). These chapters provide benefits for a disability from which a veteran has not recovered, provided that the disability was not the result of the veteran's own willful misconduct.

34. VA regulation §3.301(c)(2) and the Veterans' Administrator's Decisions on which it is based were not promulgated pursuant to Chapter 34 of the Veterans' Benefits Law, 38 U.S.C. §1651 et seq., which pertains to educational assistance benefits. Defendants have nevertheless applied this regulation to applications for educational assistance benefits



without having published notice in the Federal Register and without having received comments or considered whether it is appropriate to use a definition developed for different benefit programs during Prohibition.

35. In 1970 the Congress of the United States recognized that: "Alcoholism is an illness requiring treatment...." 42 U.S.C. §4541(a)(8) (Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970).

36. The Congress has further provided that persons with a history of alcoholism are "handicapped" individuals entitled to the protections of the Rehabilitation Act of 1973 as amended in 1978, 29 U.S.C. §706(7).

37. Defendant VA is an agency within the executive branch of the federal government, 38 U.S.C. §201, and as such

is required to comply with section 504 of the Rehabilitation Act, 29 U.S.C. §794, which provides in pertinent part:

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from participation, be denied the benefits of, or be subjected to discrimination under any program or activity...conducted by any Executive Agency....

38. By virtue of his history of alcoholism, plaintiff is a handicapped individual within the meaning of section 706(7) of the Rehabilitation Act. Having demonstrated that his disability of alcoholism prevented him from being able to pursue his education during his original delimiting period, he is entitled to an extension of his delimiting date pursuant to 38 U.S.C. §1662(a).

39. Section 504 of the Rehabilitation Act of 1973 as amended in 1978 also provides that the head of each Executive

Agency "shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation...Act of 1978." The VA has failed to review its existing regulations and promulgate regulations which carry out its obligations under the Rehabilitation Act as amended in 1978.

#### VIOLATIONS OF LAW

##### 40. VA regulation §3.301(c)(2):

A. Discriminates against qualified veterans in a federal benefit program on the basis of their handicap of alcoholism in violation of section 504 of the Rehabilitation Act, and is maintained and enforced in violation of defendants' duty to promulgate regulations to carry out the purposes of the Rehabilitation Act of 1973 as amended in 1978;

B. Was promulgated and is maintained and applied by defendants in excess of their statutory authority, without rational basis, and without observance of the procedures required by law, in violation of 38 U.S.C. §§105, 210(c)(1), 1662(a), and 5 U.S.C. §§553, 701-706 and 38 C.F.R. §1.12;

C. Creates an irrebuttable presumption and discriminates against a class of persons with a history of alcoholism without rational basis in violation of the Fifth Amendment to the Constitution of the United States.

41. By applying VA regulation §3.301(c)(2) to deny plaintiff any extension of his delimiting date for receipt of educational assistance benefits, defendants have:

A. Discriminated against a qualified handicapped individual in

violation of section 504 of the Rehabilitation Act of 1973 as amended in 1978;

B. Denied plaintiff benefits to which he was entitled by virtue of having been a disabled individual, in violation of the Veterans' Benefits Law, 38 U.S.C. §§105 and 1662(a); and

C. Discriminated against a handicapped individual in violation of the Fifth Amendment to the Constitution of the United States.

PRAYER FOR RELIEF

WHEREFORE, plaintiff respectfully requests that the court:

A. Declare, pursuant to 28 U.S.C. §2201, that defendants' regulation 38 C.F.R. §3.301(c)(2) and the Veterans' Administrator's Decisions Nos. 2 and 988 on which it is based are in violation of

the Rehabilitation Act of 1973 as amended in 1978, the Veterans' Benefits Law, the Administrative Procedure Act, and the Fifth Amendment to the Constitution and are therefore null and void;

B. Grant plaintiff's application for an extension of his delimiting date or, in the alternative, remand this case to the VA with a direction that defendants reconsider plaintiff's application without regard to VA regulation §3.301(c)(2) and Veterans' Administrator's Decisions Nos. 2 and 988;

C. Issue a permanent injunction pursuant to 28 U.S.C. §§1361 and 2202, requiring defendants, their agents, employees and successors to refrain from using or promulgating any regulation or Veterans' Administrator's Decision which is inconsistent with section 504 of the Rehabilitation Act of 1973 as amended in 1978, the Veterans' Benefits Law, 38

U.S.C. §§105, 1662(a), and the Fifth Amendment to the Constitution of the United States;

D. Issue a permanent injunction, pursuant to 28 U.S.C. §§1361, 2202, and 29 U.S.C. §794(a)(2), requiring defendants to promulgate regulations as required by section 504 of the Rehabilitation Act of 1978 and to do so pursuant to the procedures required by the Administrative Procedure Act and 38 C.F.R. §1.12.;

E. Award plaintiff costs, including disbursements, and reasonable attorneys' fees; and

F. Grant such other and further relief as may be appropriate.

Dated: New York New York  
July 13, 1982

Respectfully submitted,

/s/ Ellen V. Weissman  
MARGARET K. BROOKS  
CATHERINE H. O'NEILL  
ELLEN V. WEISSMAN  
(Legal Action Center of  
the City of New York,  
Inc.)  
19 West 44th Street  
Suite 812  
New York, New York 10036  
(212) 997-0110

Attorneys for Plaintiff



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

- - - - - X  
EUGENE TRAYNOR, :  
Plaintiff, :  
- against - : Civil  
: Action No.  
HARRY N. WALTERS, : 82 Civ.  
Administrator of the : 4583  
Veterans Administration; : (I.B.C.)  
and the VETERANS : AFFIDAVIT  
ADMINISTRATION, : OF  
Defendants. : ANNE GELLER,  
- - - - - X M.D.

STATE OF NEW YORK )  
COUNTY OF NEW YORK) ss.:

ANNE GELLER, being duly sworn,  
deposes and says:

1. I am a physician, and am currently the Director of the Smithers Alcoholism Treatment and Training Center, a comprehensive alcoholism treatment and rehabilitation facility in St. Luke's/ Roosevelt Hospital Center, New York, New York. I am also a professor of Clinical

Social Medicine at Columbia College of Physicians and Surgeons, New York, New York.

2. My medical education and training, professional experience, and published works are described in detail in my resume, a copy of which is attached as Appendix A to this affidavit. I received a bachelor's degree in medicine and a master's degree in physiology from Oxford University (Oxford, England). I earned my medical degree in 1960 from University College Hospital (London, England). Between 1960 and 1966, I completed residencies in psychiatry and neurology at New York University, Bellevue Hospital (New York, New York). Between 1966 and 1973, I served as a post-graduate fellow and professor of pharmacology at Albert Einstein College of Medicine (New York, New York). During this time I performed psychopharmacological research

and teaching, specializing in the effects of alcohol on the brain. Between 1974 and 1977, I was employed as a consultant on alcoholism and drug addition, and then as Chief Medical Consultant for the Federal Bureau of Disability, a branch of the United States Social Security Administration; my duties there included reviewing SSI disability cases involving alcoholism and addiction. Since 1977 I have been employed by the Smithers Alcoholism Treatment and Training Center ("Smithers"), serving as Coordinator of Treatment until 1979, and as Director of the program since then. In all, I have worked for eighteen years, performing both research and clinical work, in the field of alcoholism.

3. My memberships in medical and other organizations concerned with alcoholism treatment and rehabilitation are described in my resume. Among other

activities, I currently serve as Chairperson of the New York Chapter of the American Medical Society on Alcoholism, and as Chairperson of the Impaired Physicians Committee of the New York State Medical Society. I am also a member of the respective alcoholism committees of the New York State Medical Society and New York Academy of Medicine.

4. During the seven years in which I have been Coordinator of Treatment and then Director of Smithers, I have been involved in and responsible for the clinical treatment of thousands of persons with alcoholism. Smithers receives from 1000 to 1500 patients a year; I personally see about half of the patients and am responsible for organizing the clinical treatment of all patients.

5. I have published a number of articles concerning alcoholism research and treatment. Among them have been

articles on the psychopharmacology of alcoholism (including articles about the effects of alcohol on behavior and about disturbances in the brain that occur as a consequence of alcoholic drinking); on alcohol and anxiety; and on various aspects of alcoholism treatment and rehabilitation.

6. During the course of my professional career I have read and become thoroughly familiar with the available literature and studies relating to alcoholism; and with the official policies of national and international medical and professional health organizations concerning alcoholism and its treatment. I have also worked with or otherwise become familiar with the work and professional opinions of many if not most medical professionals specializing in the field of alcoholism research or treatment.

7. It is and has for many years been the consensus of the medical profession that alcoholism is a disease.

8. The American Medical Association ("AMA") first described and recognized alcoholism as an illness that requires and is appropriate for medical treatment in 1956. In its 1967 Manual on Alcoholism, the AMA defined alcoholism as follows:

Alcoholism is an illness characterized by preoccupation with alcohol and loss of control over its consumption such as to lead usually to intoxication if drinking is begun; by chronicity; by progression; and by tendency toward relapse. It is typically associated with physical disability and impaired emotional, occupational, and/or social adjustments as a direct consequence of persistent and excessive use.

\* \* \* \*

As the illness progresses, the alcoholic's preoccupation with alcohol leads

him to organize and orient his life around drinking. . . . Consumption of very substantial amounts of alcohol, however, and frequent intoxication per se are not necessarily equated with alcoholism, even though these signs usually are prominent in the course of the illness. It can happen that some alcoholics actually consume less liquor over a given length of time than do some social drinkers, but this fact in itself does not alter the basic condition nor make it less serious. The key factor is in control.

American Medical Association, Manual on Alcoholism (Chicago, 1957) at 6. [Emphasis supplied.]

9. The American Psychiatric Association ("APA") has also recognized alcoholism as a diagnosable and treatable illness for many years. It has classified alcoholism as a distinct mental disorder in every edition of its Diagnostic and Statistical Manual of Mental

Disorders ("DSM") since that comprehensive manual classifying, defining and setting forth criteria for diagnosing such disorders was first published by the APA in 1952. The APA's diagnostic criteria for alcoholism, as set forth in the current edition of this manual (DSM-III, published in 1980), are reproduced in Appendix B of this affidavit. These diagnostic criteria, with which I am in general agreement, are commonly accepted and widely used by the medical profession in diagnosing alcoholism.

10. The World Health Organization (WHO) has also officially recognized alcoholism as a distinct disease since 1951. This is reflected in its current edition of the International Classification of Diseases, Ninth Edition (ICD-9) (WHO, 1977) (No. 303, alcohol dependence syndrome).



11. The etiology (cause or causes) of alcoholism is not yet fully known. However, it is clear that the act of drinking does not itself make an individual alcoholic; of all people who drink, only 8 to 10 percent become alcoholic. Why those persons develop the disease, and what the etiology of alcoholism is, has been the subject of a great deal of research during the past twenty years. This research has shown that there are certain factors that predispose certain individuals to developing alcoholism, that make them vulnerable to developing this disease.

12. Out of that research has emerged strong evidence (consistent with my own work and clinical experience) that there is an extremely important genetic component to alcoholism. That is, there is an inheritable and inherited predisposition to developing alcoholism. Among

other studies documenting the genetic basis of this disease are recent studies of adopted children and twins in Scandinavia, whose purpose was in part to isolate environmental from genetic factors relating to alcoholism. The adoptee studies concerned children of alcoholic families who were adopted away from their biological parents at birth. They showed that, while the incidence of alcoholism among the general population of males in Scandinavia is approximately 7%, the incidence of the disease among adoptees with one alcoholic biological parent rose to 25%; and, if both biological parents were alcoholic, then the incidence of alcoholism in their adopted-away offspring rose to 50%.

13. There is a great deal of research now being done on children of alcoholics to determine precisely what it is in their genetic inheritance that

predisposes them to developing alcoholism. Although the answer is not yet clear, there is evidence that there are physical abnormalities in the way they metabolize alcohol. There also appear to be differences in the responses of children of alcoholics to alcohol, both physiological and psychological; these are still being investigated. This data suggests that the inherited predisposition of at-risk children of alcoholics is biochemical in nature.

14. Environmental and socio-cultural factors also play a role in the development of alcoholism, just as they do in other diseases that are believed to have multiple causes, such as diabetes, schizophrenia and hypertension. Persons who live in social groups or societies where drinking is accepted, where drinking practices feature heavy, regular drinking or drinking-to-drunkenness,

become more vulnerable to developing alcoholism than those who live in societies where moderate or no drinking is the norm. For example, there is a lot of drinking and relief drinking in the Armed Services; such an environment will encourage the development of alcoholism in those predisposed to it.

15. Though the causes of alcoholism are not yet fully understood, the nature and course of the illness are well known. Alcoholism is a complex and progressive illness of insidious onset which typically develops over the course of many years. No one chooses to become an alcoholic; nor does anyone make a conscious decision to begin drinking alcoholically. Persons who do become alcoholic may begin drinking for the same reasons as those who are, and are able to remain, social drinkers: because alcohol is available and drinking socially

acceptable and enjoyable. However, individuals who develop alcoholism become increasingly dependent, psychologically and often physically, upon alcohol. As the disease progresses, alcohol becomes more and more essential for the alcoholic to function adequately. It becomes so central and important a part of life that the alcoholic cannot conceive of doing anything without a drink. The alcoholic drinker does not drink for enjoyment, but to medicate himself: to alleviate anxiety and tension (for alcohol is a sedative) and, where physical dependency upon alcohol develops (as discussed below), to fend the pain of withdrawal.

16. The alcoholic's increasing dependency upon the drug is not something over which he has conscious control. Indeed, as the individual becomes progressively more dependent upon alcohol, the phenomenon of denial sets in. Denial is

an unconscious mental mechanism (unlike lying) by which an individual protects himself from recognizing his increasing need for alcohol and from being aware of the often-devastating consequences of its use. Denial is a primitive defense mechanism that all people have and may regress to in order to safeguard themselves against the recognition of something which is threatening to their well-being. It is the ostrich syndrome: I don't see it; therefore it is not there. Denial is a common phenomenon in childhood; it is also a defense mechanism that adults often regress to when faced with catastrophe, illness or other life-threatening circumstances. Denial is a universal characteristic of alcoholism, and is inevitably present in the alcoholic. Indeed, as the illness progresses and the alcoholic's dependency upon alcohol increases, the denial itself



also progresses. The greater his need for alcohol, the greater becomes the alcoholic's denial of that need and the consequences of his drinking. Denial thus permits the alcoholic to persist in drinking, to satisfy his compelling need for alcohol, even in the face of the most extremely adverse consequences to his health and social and occupational functioning. It is this combination of gradually increasing dependency and denial that makes alcoholism so insidious an illness: the alcoholic simply does not and cannot let himself recognize what is happening to him. (And this defines a major purpose and focus of alcoholism treatment and rehabilitation: to break down the unconscious defense mechanism of denial, so as to enable the alcoholic to admit, and then learn to deal with, his dependency.)

17. Many (though not all) alcoholic drinkers develop physiological as well as psychological dependency upon the drug alcohol; this is characterized by tolerance (the need for ever greater amounts of alcohol in order to achieve the sought-for-effect) and withdrawal upon discontinuance of the drug (whose symptoms include anxiety, nausea, irritability, and possibly delirium tremors and seizures). There is a particular mechanism in the brain that responds to certain kinds of substances, of which alcohol is one, whereby the brain becomes adapted to the presence of the drug. As a consequence of this, the individual, in order to have the same effect from the drug, needs to have more and more of it. As this tolerance increases the addiction of the brain increases. When the use of alcohol is abruptly discontinued, one is left with a brain that is adapted to



alcohol, with nothing there for it to adapt to. The result is withdrawal, which is not only physically (as well as psychologically) painful but can be life-threatening. Thus, in persons who develop physiological dependence upon alcohol -- and those with daily drinking patterns will inevitably become physically dependent over time -- the use of alcohol becomes a matter of pure physical necessity: a certain level of alcohol must be maintained in the system in order to stave off withdrawal.

18. The salient characteristic of the alcoholic drinker is his loss of control over his drinking behavior. In contrast to the social drinker, once alcohol is in his system, the alcoholic's ability not to pick up another drink is lost; it is not something over which he has conscious or voluntary control. Thus alcoholics may, and many do, resolutely

and repeatedly promise themselves not to drink, to have only one drink, to stop drinking -- but repeatedly fail to do so. They cannot control their drinking not because they are irresolute or morally weak, but because they are alcoholic. This inability to alter or modify one's drinking pattern or to control intake once begun is a unique feature of alcoholic drinking, and not a part of social drinking at all.

19. In the majority of cases, alcoholism is a primary condition. That is, it is not the secondary result or manifestation of some other preexisting or underlying psychiatric disorder. However, many alcoholics present systems of depression and anxiety; these are common biochemically-induced psychiatric consequences of alcoholism, occurring as the result of alcohol's effect on neurotransmitters in the brain. (Thus,

detoxification and abstinence from alcohol will often be accompanied by the gradual decrease or disappearance of depression and anxiety in recovering alcoholics.) In some individuals, though, alcoholism is antedated by or associated with other distinct psychiatric disorder(s); and a dual diagnosis of alcoholism and other disorder(s) is appropriate.

20. In my seven years of clinical work at Smithers, in the preceding four years when I served as a consultant for the Social Security Administration reviewing SSI disability cases involving alcoholism, and as a result of my other professional experience in this field, I have had the opportunity to review the medical records and cases of thousands of persons diagnosed as having alcoholism. That experience confirms that the kind of diagnosis that is made

in the case of a particular individual -- whether the sole diagnosis is alcoholism, or whether a second diagnosis of a separate psychiatric disorder is also made -- is to a considerable degree fortuitous. That is, the nature of the diagnosis is likely to depend upon the nature of the facility where the individual is treated and the diagnosis is made, and upon the orientation -- medical or psychiatric -- of that particular facility. For example, alcohol detoxification units of hospitals or other medical facilities are likely to treat alcoholism as solely a medical condition, and persons treated in such facilities are apt to be given a diagnosis of primary alcoholism only. (Elmhurst Hospital, where I understand Eugene Traynor was treated, is one such facility.) Psychiatric facilities are more likely to consider and therefore to make second

diagnoses of psychiatric disorders in addition to alcoholism. In addition, because biochemically-induced depression and anxiety so often accompany alcoholism, the business of making accurate differential diagnosis becomes all the more difficult. This is not to say that accurate differential diagnoses cannot be or are never made in cases of alcoholism; but it is to say that chance does play a role in the diagnostic process in many individual alcoholics' cases.

21. In sum, alcoholism is a complex, chronic illness with both physiological and psychological components whose hallmarks are dependency, denial and the loss of control over one's drinking patterns and use of alcohol. It is, however, also an illness from which recovery is possible, as the many recovering and recovered alcoholics who have learned to accept and deal with their

illness, and been restored to health and normal functioning, can confirm.

22. I have personal knowledge of the facts stated herein.

/S/  
ANNE GELLER, M.D.

Sworn to before me this  
25 day of March, 1984.

/S/  
Notary Public

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

EUGENE TRAYNOR,	)	
	)	
Plaintiff,	)	
	)	
- against -	)	CA No. 82
	)	
	)	4563 (I.B.C.)
HARRY N. WALTERS,	)	
Administrator of the	)	AFFIDAVIT OF
Veterans Administration;	)	SHELDON
	)	ZIMBERG, M.D.
and the VETERANS Admin-	)	
istration,	)	
	)	
Defendants.	)	
	)	

STATE OF NEW YORK )  
COUNTY OF NEW YORK ) ss.:

SHELDON ZIMBERG, being duly  
sworn, deposes and says:

1. I am a physician, and am  
currently the Director of Psychiatry at  
the Joint Diseases, North General Hospital  
(New York, New York). I am also an  
Associate Professor of Psychiatry at

Mount Sinai School of Medicine (New York,  
New York).

2. My medical education and  
training, professional experience, and  
published works are described in detail  
in my curriculum vitae, a copy of which  
is attached as Appendix A to this affi-  
davit. I received a bachelor's degree  
from Brooklyn College (Brooklyn, New  
York) in 1957, and earned my medical  
degree from the State University of New  
York, Downstate Medical Center in 1961.  
From 1961 to 1962 I served as a medical  
intern at the Jewish Hospital of Brooklyn  
(Brooklyn, New York) and from 1962 to  
1965 I completed a residency in psychia-  
try at Columbia Presbyterian Medical  
Center (New York, New York) and the New  
York State Psychiatric Institute (New  
York, New York). Between 1963 and 1966 I  
held a fellowship in community psychiatry  
at the Columbia University School of



Public Health and Administrative Medicine, and in 1966 I receive a masters degree in Community Psychiatry from that school.

3. Since 1965 I have been engaged in the private practice of psychiatry. In addition, from 1966 to 1970 I was an Instructor in Psychiatry at Columbia University, College of Physicians and Surgeons (New York, New York). From 1966 to 1969 I was chief of the Division of Community Psychiatry at Harlem Hospital (New York, New York). From 1967 to 1970 I was director of the Harlem Hospital Center Alcoholism Unit. Between 1970 and 1973 I was an Associate in Psychiatry at the Columbia University College of Physicians and Surgeons. From 1969 to 1973 I was Deputy Director of the Rockland County Community Mental Health Center (Pomona, New York). I was the Project Director of the Alcoholism

Treatment Center at the Joint Diseases, North General Hospital from 1973 to 1977. I was an Assistant Clinical Professor of Psychiatry at Columbia University College of Physicians and Surgeons from 1973 to 1974, and an Assistant Clinical Professor of Psychiatry at Mount Sinai School of Medicine from 1974 to 1977. I was Acting Director of the Department of Psychiatry at the Joint Diseases, North General Hospital from 1975 to 1977, and have been Director since 1977. Since 1977 I have also been an Associate Professor of Psychiatry at the Mount Sinai School of Medicine.

4. My memberships in medical and other organizations concerned with alcoholism treatment and rehabilitation are described in my curriculum vitae. Among other activities, I have served as Chairman of the Committee on Alcoholism and Drug Abuse of the New York County

District Branch of the American Psychiatric Association, Chairman of the Committee on Treatment of Alcoholism of the New York State Alcoholism Planning Task Force, and Chairman of the Committee on Inpatient Alcoholism Detoxification Criteria of the New York County Health Services Review Organization.

5. During the 19 years in which I have been practicing psychiatry, I have been involved in and responsible for the clinical treatment of hundreds of alcoholics. In addition, I have supervised the treatment of thousands of others. This clinical experience has been obtained in private psychiatric practice, in an urban general hospital center alcoholism treatment program, and in a suburban community mental health center alcoholism treatment program.

6. I have published a number of articles on the causes of and treatment for alcoholism. My publications and

presentations are listed in the attached curriculum vitae. I have also written a book, entitled The Clinical Management of Alcoholism (New York: Brunner/Mazel, 1982), which discusses these issues.

7. During the course of my professional career I have read and become thoroughly familiar with the available literature and studies relating to alcoholism; and with the official policies of national and international medical and professional health organizations concerning alcoholism and its treatment. I have also worked with or otherwise become familiar with the work and professional opinions of many if not most medical professionals specializing in the field of alcoholism research and treatment.

8. It is and has for many years been the consensus of the medical profession that alcoholism is a disease. This fact was recognized by the American

Medical Association in 1956. The World Health Organization has also, since 1951, officially recognized alcoholism as a distinct disease.

9. The American Psychiatric Association has also recognized alcoholism as a diagnosable and treatable illness for many years. It has classified alcoholism as a distinct mental disorder in every edition of its Diagnostic and Statistical Manual of Mental Disorders ("DSM") since that comprehensive manual classifying, defining and setting forth criteria for diagnosing such disorders was first published by the APA in 1952. I served on the advisory committee for Substance Abuse Disorders which helped prepare the definition of and diagnostic criteria for alcoholism, which appear in the current edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders

(DSM-III, published in 1980). These diagnostic criteria are commonly accepted and widely used by the medical profession in diagnosing alcoholism.

10. There are about nine to ten million alcoholics in the United States. However, it is clear that the simple act of drinking -- even to excess -- does not itself make an individual an alcoholic. Of all people who drink, only about five percent become alcoholic. There has been a great deal of research directed toward determining the cause or causes of alcoholism. This research has turned up evidence that individuals with a family history of alcoholism, including parents, siblings, grandparents, uncles and aunts, are at greater risk of developing the disease. A number of studies have shown this correlation to be due, at least in large part, to a genetic predisposition to alcoholism. In 1970, G. Winokur and

associates performed a family study in St. Louis on 259 hospitalized alcoholics from both a state and a private hospital. They interviewed first-degree relatives (parents, children, siblings) of the alcoholic individuals and found that about 50 percent of the male first-degree relatives were alcoholic. (Winokur, G., Reich, T. Rimmer, J. et al., "Alcoholism: Its Diagnosis and Familiar Psychiatric Illness," in 259 Alcoholic Probands. Arch. Gen. Psychiat., 1970, 23:104 - 111.) M.S. Schuckit developed a half-sibling study, which allowed comparisons of children of alcoholic parents raised in foster homes with non-alcoholic parent figures and children without a biologic alcoholic parent raised in foster homes with an alcoholic parent figure. For every comparison of the relative influence of having a biologic parent as opposed to having lived with an adoptive



alcoholic parent figure, the biologic influence predominated in relation to the development of alcoholism. (Schuckit, R.J., Goodwin, D.W. and Winokur, G. "A Half Sibling Study of Alcoholism," Amer. J. Psychiat. 1972, 128:1132 - 1136.) A more recent study by R.J. Cadoret and associates confirmed these findings. (Cadoret, R.J., Cain, C.A. and Grove, W., "Development of Alcoholism in Adoptees Raised Apart from Alcoholic Biologic Parents," Arch. Gen. Psychiat. 1980, 37:561 - 563.)

11. A second factor which contributes to the development of alcoholism is the patient's environment and cultural background. It is well established that certain ethnic groups have very low rates of alcoholism and other groups have very high rates independent of the availability of alcohol. Alcohol use differs in function within

and between societies, cultures, subcultures, ethnic, and religious groups. Attitudes concerning the use of alcohol in a society fall within several general types, and help to determine general rates of alcoholism. For example, some societies encourage total abstinence from alcohol, by virtue of religious principles or traditions where drinking alcohol is regarded as a most serious antisocial act without justification, and/or immoral and sinful. Exceptions to these prohibitions are not tolerated and infractions are strongly condemned. There is very little distinction made between the social drinker and the alcoholic since all drinking is condemned. In these societies, alcoholism is relatively rare. In other societies, the use of alcohol is accepted, but only within specific settings, rituals or ceremonial rites.

The incidence of alcoholism varies in these societies according to the degree of controls for strict use and against excesses. Finally, where the use of alcohol, including drinking leading to intoxication, is accepted, as it is within many cultures in the United States, the prevalence of alcoholism is high.

12. My own work and clinical experience has lead me to develop a psychodynamic model of the primary alcoholic (the distinction between primary and secondary alcoholism will be discussed below). I do not believe it is appropriate to look for or to characterize an "alcoholic personality." However, my work in the field has taught me that many alcoholics have suffered from childhood rejection, overprotection, or premature responsibility, which leads to

an unconscious need for nurturance which cannot be met in reality and results in rejection. This rejection leads to anxiety, which in turn leads to the development of a number of defense mechanisms, particularly denial, and a compensatory grandiosity. The grandiosity causes such individuals to try harder and results in inevitable failure. Failures lead to more anxiety, depression, anger and guilt. These unpleasant effects can be reduced by alcohol, at least for a time, and lead to pharmacologically induced feelings of power and omnipotence, thus reinforcing the denial and reactive grandiosity. An individual with such a psychological conflict will become an alcoholic if there is a genetic predisposition to alcoholism (see paragraph 10 above), and if he lives in a society in which the use of alcohol is socially accepted or in which there is

considerable ambivalence regarding the use of alcohol (see paragraph 11 above).

13. As the above discussion indicates, alcoholism is a complex and progressive illness which gradually develops over the course of many years. No one makes a conscious choice to become an alcoholic. Many individuals with a genetic or cultural predisposition toward alcoholism never develop the illness because they do not suffer from the necessary psychological conflict. Others who exhibit the typical psychological traits never develop alcohol abuse problems because of the absence of the genetic component. Persons who do become alcoholic may begin drinking for the same reasons as those who are able to remain social drinkers. The disease is the result of the confluence of a number of predisposing factors. In the final analysis, however, none of these factors -- be they genetic, environmental or

psychodynamic -- are within the conscious control of the individual.

14. Historically, alcoholism has been viewed as a moral weakness by the lay public, and it is clear that there is a behavioral component to the disease. However, the course of a number of diseases, including diabetes, hypertension and lung cancer as well as alcoholism, is influenced by the behavior of the patient. Just as the progress of diabetes is influenced by the diabetic's eating patterns, the progress of alcoholism is influenced by the alcoholic's drinking patterns. Similarly, respiratory illnesses and hypertension are commonly linked to cigarette smoking.

15. In fact, the act of drinking alcohol may be less within the conscious control of the patient than many other debilitating behaviors precisely because the phenomenon of denial

is an integral a part of the disease of alcoholism. A number of researchers have noted that the predominant defense mechanism in the alcoholic is denial. Denial involves the avoidance of awareness of the harmful consequences of drinking. The central problem in the rehabilitation of an alcoholic is breaking through the massive though unconscious denial which is inevitably present. The typical response of an alcoholic is, "I can stop drinking any time I want to." In fact, the patient would not be alcoholic if he had the ability to exert conscious control over his behavior. One of the primary goals of alcoholism treatment, therefore, is to help the alcoholic understand that he is not in reality choosing to drink at all. Once this absence of volition has been brought to the attention of the patient, he has taken a giant step toward overcoming the disease.



16. Chronic use of alcohol produces tolerance to its central nervous system effects, and requires more and more alcohol to produce the mood and behavioral changes sought by the alcoholic. If alcohol is used long enough, an addiction is produced that can result in serious withdrawal reactions that can be life-threatening. The central nervous system mechanics of tolerance and addiction are not fully understood at the present time, but alcohol has profound effects on neuro-transmitters, particularly in producing a rapid turnover of central nervous system norepinephrine. As a result, the alcoholic must gradually increase the amount of alcohol he ingests in order to produce a constant effect. As tolerance increases, so does the physiological addiction. If the alcoholic is unable to maintain the level of alcohol intake his body needs, he will

experience a painful and possibly dangerous withdrawal. In essence, the physiologically dependent alcoholic uses the drug alcohol out of pure physical necessity. Here again, as the physiological need for alcohol increases so does the alcoholic's denial. Each feeds on the other, and they combine to produce a pattern of drinking which the patient can neither control nor understand.

17. A distinction is and can be made between primary and secondary alcoholism. The primary alcoholic has alcoholism as the major disorder with a significant coexisting psychiatric disorder or a psychiatric disorder developed after the onset of the alcoholism. (The psychological conflicts which I have described earlier as typical in primary alcoholics do not rise to the level of psychiatric disorders.) The secondary alcoholic develops alcoholism after the

onset of a major psychiatric disorder such as a severe depression. The psychiatric disorder can be viewed as being a major causal factor in the development of secondary alcoholism. This distinction is an important one to be aware of in planning the treatment of an alcoholic patient. If a patient presents evidence of alcoholism along with signs and symptoms of another psychiatric disorder, it is necessary to determine if the onset of the alcohol problem preceded or followed the development of the psychiatric disorder. The only way to be reasonably certain that a particular individual's alcoholism is either primary or secondary to another psychiatric disorder is to observe the patient alcohol-free for three to four weeks. If the psychiatric signs and symptoms persist in an alcohol-free state, one can assume the presence of a primary psychiatric disorder.

18. In my years of clinical experience treating and supervising the treatment of thousands of alcoholics, and in the course of my research on the treatment and diagnosis of alcoholism, I have found that many patients have been incorrectly diagnosed. In fact, it has been my experience that the diagnosis which is made in the case of a particular patient -- whether it be primary alcoholism or alcoholism secondary to a primary psychiatric disorder -- is often a function of the nature of the treatment facility itself, and has little to do with the patient's clinical and social history. Thus, patients who are diagnosed in a psychiatric facility are more likely to be described as secondary alcoholics, while patients treated in detoxification units of general hospitals are usually given a diagnosis of primary alcoholism. I believe that an accurate

differential diagnosis can be made in alcoholism cases. In order to accomplish this, however, a patient must remain in treatment for three to four weeks. Because many patients who are clearly alcoholic are detoxified and released after a much shorter period of hospitalization, an accurate differential diagnosis as to the type of alcoholism from which they suffer is not possible.

19. I have been informed by counsel for Mr. Traynor that it is the policy of the Veterans Administration to deny an extension of delimiting date for receiving education benefits to a veteran whose sole disability is primary alcoholism. I understand that this policy is due to Veterans Administration regulations which presume primary alcoholism to be (an/or to be the result of) "willful misconduct (as that term is defined in Veterans Administration §§ 3.1(n) and

3.301(c)(2), which I have read.) It is my professional judgment that this characterization of the illness and the attendant policy is in conflict with the weight of available medical evidence, and shows a clear misunderstanding of the nature and causes of alcoholism. I know of no competent expert in the field of alcoholism who would agree with the Veterans Administration's description of alcoholism as resulting from willful misconduct.

20. I have also read Administrator's Decision, Veterans Administration No. 988 (August 13, 1964), which provides in part:

. . . With common social acceptance of the use of alcohol as a beverage, onset of the secondary condition may be very insidious in its development. Under such circumstances the development of the secondary condition does not meet the definition of intentional



wrong-doing with knowledge or wanton disregard of its probable consequences. Secondary results are not the usual and probable effects of drinking alcohol as a beverage. By the time there is sufficient awareness of any probable deleterious consequences, the process has developed to a point where it is irreversible without professional help. At such time, the person by himself, may lack the capacity to avoid the continued use of alcohol. While it is proper to hold a person responsible for the direct and immediate results of indulgence in alcohol, it cannot be reasonably said that he expects and wills the disease and disabilities which sometimes appear as secondary effects.

It is my professional judgment that this description of the development of secondary conditions resulting from a primary alcoholism applies with equal force to the development of primary alcoholism as well. In fact, the above quoted language from Administrator's Decision 988 is a

more accurate description of the development of primary alcoholism that it is of the secondary organic conditions which may result, since it is the underlying alcoholism and not the secondary condition which is the disease.

21. I have reviewed the records from Mr. Traynor's five hospitalizations which occurred during the period between 1970 and 1974. On the basis of the information contained in those records (see Exhibit B.2), it is my professional opinion that Mr. Traynor suffered from alcoholism and was physically addicted to the use of alcohol.



22. I have personal knowledge  
of the facts stated herein.

/s/  
SHELDON ZIMBERG, M.D.  
127a East 71st Street  
New York, New York 10021

Sworn to before me this  
29th day of March, 1986

/s/  
Notary Public

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

At a stated Term of the United  
States Court of Appeals for the Second  
Circuit, held at the United States  
Courthouse in the City of New York, on  
the 16th day of May, one thousand nine  
hundred and eighty-six.

Present: HON. WILLIAM H. TIMBERS

HON. AMALYA L. KEARSE

HON. GEORGE C. PRATT,

Circuit Judges,

EUGENE TRAYNOR,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 85-6208
	)	
HARRY W. WALTERS, ADMINIS-	)	
TRATOR OF THE VETERANS	)	
ADMINISTRATION,	)	
	)	
Defendants-Appellants.	)	

Appeal from the United States  
District Court for the Southern District  
of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is reversed and the action be and it hereby is remanded to the said district court for further proceedings in accordance with the opinion of this court with costs to be taxed against appellee.

Elaine B. Goldsmith  
Clerk

/s/  
By: Edward J. Guardaro  
Deputy Clerk

EXCERPT FROM  
TRANSCRIPT OF JULY, 1980 PROCEEDINGS  
BEFORE THE BOARD OF VETERANS APPEAL  
JAMES P. McKELVEY

\* \* \* \*

[Page 16]

Mr. Chairman:

Thank you Mr. Larama. Mr. McKelvey before I turn the questioning over to Dr. Weinstein I want to make one thing clear so that we can channel your testimony throughout the remainder of the Hearing along lines that would be important in our consideration whether or not there is a basis to allow this appeal and that is, I am aware of the medical disagreement about what kind of an animal alcoholism is. As far as we are concerned at the Board of Veterans Appeals, we don't have discretion to say that primary alcoholism is a disease. It is

defined in regulations as willful misconduct and whether we want to call it a disease or not, we have no authority to do that, we're bound by those regulations, so what we're after as Mr. Larama may have indicated to you, is some evidence that the alcoholism may have been secondary to a psychiatric

[Page 17]

or organic condition of some kind rather than existing on a primary basis or alternatively, that there were other conditions either psychiatric or organic which in themselves would have precluded you from pursuing a course of education during the relevant period. So having made these remarks I will now turn the questions over to Dr. Weinstein.

★ ★ ★ ★

IN THE APPEAL OF  
JAMES P. MCKELVEY

C 28 871 132

BOARD OF VETERANS APPEALS  
Washington, D.C. 20420

FINDINGS AND DECISION ) Docket No.  
                                      ) 79-04 991  
                                      )  
                                      ) Date  
                                          August 6, 1980

THE ISSUE

Entitlement to an extension of the veteran's delimiting date for educational assistance benefits.

REPRESENTATION

Appellant represented by: The American  
                                          Legion

WITNESS AT HEARING ON APPEAL

James P. McKelvey, appellant

CONSULTATIONS BY THE BOARD

Francis F. Talbot, Staff Legal Adviser

#### ACTIONS LEADING TO PRESENT APPELLATE STATUS

This case was before the Board in June 1979, at which time it was remanded for additional development. The requested development has been attempted and the case has been returned to the Board for further appellate review.

#### CONTENTIONS

The veteran and his representative contend, in essence, that it is unclear whether the veteran's drinking problem or emotional problem began first; that he was treated in service at a mental hygiene clinic; that conditions beyond his control prevented him from completing his program of education before his delimiting date; that, while he was treated for alcoholism, treatment was also extended for conditions secondary to his alcoholism; that the veteran suffered

from fear, anxiety and depression; and that he has not had a drink since May 10, 1975.

#### THE EVIDENCE

The veteran served on active duty from September 1963 to September 9, 1966. On report of medical history completed by the veteran in conjunction with his entrance examination, he stated he had or had had nervous trouble. Service medical records reflect that on January 7, 1964, he was seen because of problems sleeping at night. He was reassured and referred to the mental hygiene clinic. On January 8, 1964, he was seen by the mental hygiene clinic for a followup. On report of medical history completed by the veteran in conjunction with his separation examination, he did not note any psychiatric problems. The veteran received



Chapter 34 benefits for training conducted from January 1973 to May 1973. The veteran's application for extension of his delimiting date was received by the Veterans Administration in November 1977. In January 1978, the Veterans Administration received a statement dated in October 1977 from D.B.V., M.D. The doctor stated that the veteran had been treated for a depressive reaction precipitated by injury to his left medial meniscus which occurred in October 1976. The Veterans Administration was notified in February 1978 that the veteran was a patient at the Washington Adventist Hospital from March 23 to 24, 1971, with a diagnosis of acute and chronic alcoholism; on August 23, 1971, with a diagnosis of acute alcoholism; from September 5 to 7, 1971, with a diagnosis of acute and chronic alcoholism; from November 24 to 26, 1972, with a

diagnosis of acute and chronic alcoholism; from January 23 to 24, 1973, with a diagnosis of acute and chronic alcoholism; and from February 27, 1977, through March 3, 1977, with a diagnosis of torn medial meniscus, left knee arthrotomy, meniscectomy.

J.R.C. reported in a statement in January 1978 that the veteran had been known to the Montgomery County Health Department Alcohol Program since March 1971 and that at that time he was transferred to their detoxification center, and then to a hospital center. It was also reported that from March 1971 until May 1975, the veteran was in and out of their program and many other programs as a practicing chronic alcoholic plus all the other mental and physical problems related to continuous alcohol abuse.

In a statement dated in March 1978, it was reported that the veteran was admitted to the Maplewood Quarterway House for alcoholism from April 1, 1973, through April 13, 1973; August 26, 1973, through August 28, 1973; and on May 8, 1975. In April 1978, the Veterans Administration was notified that the veteran was a patient at Montgomery General Hospital from February 9, to February 12, 1974, and from October 12 to October 19, 1974, and that his diagnosis for both admissions was alcoholism.

In August 1978, the Administration received a statement prepared for the signatures of K.B. and Dr. V. The statement was dated in August 1977. It was reported that the veteran was currently experiencing a depressive reaction precipitated by his left knee injury

which occurred in October 1976 and by his heat prostration which occurred in August 1977. It was reported further that they felt that the veteran had a potential for depression which was concealed by his former alcoholism.

In August 1978, the Veteran Administration received medical records entered during the veteran's various periods of hospitalizations from 1971 through 1974. During hospitalization from March 24 to April 6, 1971, the veteran's judgment was impaired and he had partial insight. The diagnosis was alcohol addiction. Hospitalization in June 1971 resulted in a diagnosis of alcohol addiction. During hospitalization from September 15 to 17, 1971, it was reported that the veteran had fear and/or anxiety, loosening of associations, impaired judgment and partial insight.

Discharged summary dated October 12, 1971, revealed that the veteran was rehospitalized on September 25, 1971. On admission, he showed marked dermatitis on his face and arms, which the veteran reported was of 10 days' duration. He was coherent and relevant in his speech but verbally overproductive. Affect was appropriate and mood was anxious. He was correctly oriented in three spheres and memory was intact. Insight and judgment were limited. Routine laboratory workup was within normal limits. The final diagnoses were alcoholic psychosis, other alcoholic hallucinosis; and alcohol addiction.

The veteran was hospitalized from December 28 to 30, 1971. He had fear and/or anxiety, impaired judgment, and partial insight. Physical examination was within

normal limits and the discharge diagnosis was alcohol addiction. During hospitalization from May 14 to 17, 1973, it was reported that physical examination was within normal limits. The veteran's judgment was impaired and he had no insight. The discharge diagnosis was alcohol addiction. He was readmitted on May 20, 1973, and he remained until he eloped in May 1973. During this hospitalization, his judgment was impaired and he had no insight. Final diagnosis was alcohol addiction.

The veteran was hospitalized from February 9 to 12, 1974. He was admitted because of acute symptoms of anxiety and acute alcoholism. The final diagnoses were psychoneurotic reaction and acute alcoholism.



The veteran was hospitalized from October 12 to 19, 1974. The admission was prompted by an episode of acute episodic alcoholism. During the week before admission, the veteran had massive, excessive drinking with the onset of very severe upper gastrointestinal pains, hematemesis and black tarry stools. Mental status examination on admission revealed a very anxious physically distressed male whose face was flushed. He was having severe alcohol withdrawal and unquestionably he had physical pain. Stools were initially positive and then they became negative. Upper gastrointestinal series was within normal limits and the veteran's gastrointestinal symptoms rapidly subsided with a bland diet. Liver function studies showed marked disturbances of liver enzymes. Glucose tolerance test showed a very sharp drop

in the blood sugar to the level of 63 at the fourth hour. The final diagnoses were alcohol addiction, marked alcoholic gastritis, and marked psychopathic personality.

In August 1978, the Veterans Administration received a statement prepared for the signatures of K.B. and Dr. V. The statement is dated in September 1977 and is substantially to the same effect as their statement dated in August 1977.

The Veterans Administration also received in August 1978 a summary of the first interview Dr. V. had with the veteran in August 1977. It was reported that the veteran felt depressed, anxious, and tense. These feelings were the result of problems associated with his employment. The doctor expressed the opinion that the



veteran's depression was precipitated by his injury and subsequent surgery. The doctor also stated that he felt the veteran had the potential for depression for a long while, but this was covered up by his alcoholism.

The veteran appeared at a hearing conducted by the Board of Veterans Appeals in July 1980. During the hearing, a statement from J.F.C., M.D., dated in May 1979, along with Dr. C.'s resume, was submitted. The doctor stated that he had known the veteran for 7 1/2 years; that the veteran was his patient from 1971 to 1975; that the veteran was a disturbed young man who was impulsive, explosive, and frequently suicidal; and that the veteran had a serious drinking problem secondary to his anxiety. The doctor reported further that, psychiatrically,

with the veteran's anxiety, paranoia, depression and hysteria, he was clearly suffering from a borderline personality (schizophrenic reaction--latent type). He noted that these diagnoses were established during hospitalizations from 1971 to 1973. The veteran testified during the hearing that he began drinking at age 13 for the purpose of relieving anxiety; that during service, he drank to relieve tension; that his drinking made him physically sick; that he was hospitalized 33 times from 1971 to 1975; that the hospitalizations were caused by physical distress; that currently he is not receiving psychiatric treatment; and that he had a great deal of difficulty adopting to service.

#### THE LAW AND REGULATIONS

No educational assistance benefits shall be afforded an eligible veteran under Chapter 34 beyond the date 10 years after the veteran's last discharge or release from active duty after January 31, 1955, or December 31, 1989, whichever is earlier. A veteran may be granted an extension of the applicable delimiting period if the veteran was prevented from initiating or completing the chosen program of education within the otherwise applicable delimiting period because of a physical or mental disability that did not result from the willful misconduct of the veteran. It must be clearly established by medical evidence that such a program of education was medically infeasible. A veteran who is disabled for a period of 30 days or less will not be considered as having been prevented

from initiating or completing a chosen program, unless the evidence establishes that the veteran was prevented from enrolling or reenrolling in the chosen program of education, or was forced to discontinue attendance, because of the short disability. (38 U.S.C. 1662(a); 38 C.F.R. 21.1042, 21.1043)

The simple drinking of alcoholic beverages is not of itself willful misconduct. The deliberate drinking of a known poisonous substance or under conditions which would raise a presumption to that effect will be considered willful misconduct. If in drinking of a beverage to enjoy its intoxicating effects, intoxication results proximately and immediately in disability or death, the disability or death will be considered the result of the person's willful misconduct. Organic

diseases and disabilities which are a secondary result of the chronic use of alcohol as a beverage, whether out of compulsion or otherwise, will not be considered of willful misconduct origin. (38 C.F.R. 3.301(c)(2))

#### DISCUSSION AND EVALUATION

Under the regulations, the disability of alcoholism is considered to be of willful misconduct origin and may not be a basis for an extension of the delimiting date for Chapter 34 benefits whenever it exists as a primary condition. The record shows numerous hospitalizations from 1971 to 1974 caused by alcoholism. During some of those hospitalizations, physical disabilities were noted, but those physical disabilities were not of sufficient magnitude or duration so as to prevent the veteran from pursuing training

under Chapter 34. During the veteran's brief hospitalization in February 1974, the diagnosis of a psychoneurotic reaction was entered. However, the record fails to establish that the veteran's alcoholism is the result of a neurosis. He began drinking at age 13 and there is no evidence that an acquired psychiatric disease preceded the veteran's alcoholism. The veteran is not currently receiving psychiatric care, which supports the position that his alcoholism was not the result of an acquired psychiatric disease. Simply stated, the evidence does not establish that any innocently acquired disability the veteran may have experienced during the period September 1966 to September 9, 1976, was of sufficient magnitude or duration so as to preclude training. Therefore, there is no basis on which to grant the veteran an extension

of his delimiting date. We have no doubt that if an extension were granted the veteran would use the benefits wisely and become a more productive member of society. Regrettably, an extension of the veteran's delimiting date for educational assistance benefits is not warranted.

#### FINDINGS OF FACT

1. During the period 1971 to 1974, the veteran was hospitalized a number of times because of alcoholism. The alcoholism was shown to be a primary condition.
2. There was no innocently acquired disability during the period September 1966 to September 9, 1976, which was of sufficient severity so as to prevent the veteran from pursuing training during this period.

#### CONCLUSION OF LAW

The requirements for extension of the veteran's delimiting date for educational assistance benefits beyond September 9, 1976, are not met. (38 U.S.C. 1662(a); 38 C.F.R. 3.301(c)(2), 21.1042, 21.1043)

#### DECISION

Entitlement to an extension of the veteran's delimiting date for educational assistance benefits is not established. The appeal is denied.

/s/  
J.J. SCHULE

/s/  
JACOB J. WEINSTEIN,  
M.D.

/s/  
BRUCE E. HYMAN



IN THE APPEAL OF  
JAMES P. MCKELVEY

C 28 871 132

BOARD OF VETERANS APPEALS  
Washington, D.C. 20420

FINDINGS AND DECISION ) Docket No.  
RECONSIDERATION ) 79-04 991  
 )  
 ) Date  
 ) February 23, 1982

#### THE ISSUE

Entitlement to an extension of the  
veteran's delimiting date for educational  
assistance benefits.

#### REPRESENTATION

Appellant represented by: Anne E. Moran,  
Attorney at Law

#### WITNESS AT HEARING ON APPEAL

James P. McKelvey, appellant

#### CONSULTATIONS BY THE BOARD

William J. Reddy, Staff Legal Adviser

#### ACTIONS LEADING TO PRESENT APPELLATE STATUS

In August 1980, the Board denied an  
extension of the veteran's delimiting  
date for educational assistance benefits.  
Pursuant to a request by the veteran and  
his representative, an enlarged panel has  
been convened for the purpose of reconsid-  
ering the case.

#### CONTENTIONS

In their request for reconsideration, the  
veteran and his representative set forth  
five separate contentions:

(1) The Board's determination that the  
veteran's chronic alcoholism was "willful  
misconduct" was erroneous;

(2) The Board was incorrect in failing  
to find that the veteran's mental anxiety

caused his alcoholism and prevented him from using his educational benefits;

(3) The Board was incorrect in failing to find that the veteran's mental anxiety was a secondary result of his alcoholism, and of sufficient severity to entitle him to an extension of his benefits under the regulations; and

(5) The veteran's medical records demonstrated physical disabilities due to alcoholism that entitled him to an extension of his benefits.

#### FINDINGS OF FACT

After careful consideration of the entire evidentiary record, the Board's prior decision, and the arguments advanced by

the appellant, the Board finds the following:

1. The veteran served on active duty from September 1963 to September 1966.
2. In its decision of August 1980, the Board found that, during the period of 1971 to 1974, the veteran was hospitalized a number of times because of alcoholism. The alcoholism was shown to be a primary condition. The Board also found that the veteran had no innocently acquired disability during the period September 1966 to September 9, 1976, which was of sufficient severity so as to prevent the veteran from pursuing training during this period. The Board determined that, under the regulations, the disability of alcoholism is considered to be of willful misconduct origin and

may not be a basis for an extension of the delimiting date for Chapter 34 benefits whenever it exists as a primary condition. It was noted that, during some of the veteran's hospitalizations for alcoholism, physical disabilities were found but the physical disabilities were not of sufficient magnitude or duration so as to prevent the veteran from pursuing training under Chapter 34. It was also noted that, during a brief hospitalization in February 1974, a diagnosis of psychoneurotic reaction was made. It was further determined that the record failed to establish that the veteran's alcoholism was the result of a neurosis. The Board observed that the veteran began drinking at age 13 and there was no evidence that an acquired psychiatric disease preceded the veteran's alcoholism.

3. The Board finds no obvious error in its decision of August 1980.

#### THE LAW AND REGULATIONS

The decision of the Board of Veterans Appeals is final, except that the Board may correct an obvious error in the record. Reconsideration of an appellate decision may be accorded by the Board of Veterans Appeals. (38 U.S.C. 4003: 38 C.F.R. 19.148)

No educational assistance benefits shall be afforded an eligible veteran under Chapter 34 beyond the date 10 years after the veteran's last discharge or release from active duty after January 31, 1955, or December 31, 1989, whichever is earlier. A veteran may be granted an extension of the applicable delimiting period if the veteran was prevented from

initiating or completing the chosen program of education within the otherwise applicable delimiting period because of a physical or mental disability that did not result from the willful misconduct of the veteran. It must be clearly established by medical evidence that such a program of education was medically infeasible. A veteran who is disabled for a period of 30 days or less will not be considered as having been prevented from initiating or completing a chosen program, unless the evidence establishes that the veteran was prevented from enrolling or reenrolling in the chosen program of education, or was forced to discontinue attendance, because of the short disability. (38 U.S.C. 1662(a); 38 C.F.R. 21.1042, 21.1043)

The simple drinking of alcoholic beverages is not of itself willful misconduct. The

deliberate drinking of a known poisonous substance or other conditions which would raise a presumption to that effect will be considered willful misconduct. If in drinking of a beverage to enjoy its intoxicating effects, intoxication results proximately and immediately in disability or death, the disability or death will be considered the result of the person's willful misconduct. Organic diseases and disabilities which are a secondary result of the chronic use of alcohol as a beverage, whether out of compulsion or otherwise, will not be considered of willful misconduct origin. (38 C.F.R. 3.301(c)(2))

When a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant. A



reasonable doubt means a substantial doubt and one within the range or probability as distinguished from speculation or remote possibility. (38 C.F.R. 3.102)

#### DISCUSSION AND EVALUATION

A final decision of the Board of Veterans Appeals may not be reversed except upon a finding of obvious error. To constitute obvious error, the evidence must be so persuasive of facts contrary to the Board's prior decision as to preclude any other determination. We find no such error in the instant case.

The appellant's primary contention is that the applicable regulation cannot be interpreted to define chronic alcoholism as willful misconduct. It has been the consistent interpretation by the Board that the regulation defines alcoholism as

the "deliberate drinking of a known poisonous substance," and, therefore, is willful misconduct. We are cognizant of the arguments advanced by the appellant against this interpretation. However, we are firm in our belief that the regulation does, indeed, define alcoholism as willful misconduct.

It is also contended that the veteran's psychoneurotic problem, singly, and in relation to his alcoholism, can be used as a basis for an extension of the delimiting date. However, the evidence establishes that the veteran's primary disability was alcoholism, for which he was hospitalized on many occasions. The evidence simply does not establish that the veteran's psychoneurotic problem was of sufficient severity as to prevent him from using his benefits. Similarly, the

medical evidence fails to indicate that the veteran's physical disabilities were of such magnitude or duration as to prevent him from pursuing training.

After a careful review of the entire evidentiary record and careful consideration of the appellant's arguments, we must conclude that the veteran failed to use his benefits by reason of his alcoholism. Accordingly, we must also conclude that the Board's prior decision does not contain obvious error.

The doctrine of reasonable doubt has been considered, but the facts of this case raise no such doubt.

#### CONCLUSION OF LAW

The decision entered by the Board in August 1980 denying an extension of the

veteran's delimiting date for educational assistance benefits represents the correct application of the governing laws and regulations to the facts found to be shown by the evidence and does not involve obvious error. (38 U.S.C. 4003; 38 C.F.R. 3.102, 19.148)

#### DECISION

Obvious error not having been found on reconsideration, the Board's decision of August 1980 is affirmed as a final determination. On reconsideration, the benefit sought on appeal remains, denied.

/s/  
JACK W. BLASINGAME

/s/  
B.G. BROWN, M.D.  
(Substituting for  
DR. WEINSTEIN, who  
is on extended  
leave.)

/s/  
J.J. SCHULE

/s/  
H.H. CLARK

/s/  
W.H. YEAGER, M.D.

/s/  
C.D. ROMO

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

JAMES P. McKELVEY  
6972 Deep Cup  
Columbia, Maryland 21045  
(312) 565-7685

Plaintiff, )

v. )

HARVEY N. WALTERS, )

Administrator of Veterans  
Affairs  
810 Vermont Avenue, N.W.  
Washington, D. C. 20420,

and )

VETERAN'S ADMINISTRATION  
810 Vermont Avenue, N.W.  
Washington, D. C. 20420,

Defendants.) )

COMPLAINT FOR DECLARATORY RELIEF,  
INJUNCTIVE RELIEF, AND MONEY DAMAGES

This action for declaratory  
and injunctive relief and for money  
damages challenges the legality of a

) Civil  
) Action  
) No.  
) 83-2063

regulation of the Veterans Administration which defines alcoholism as "willful misconduct" and thereby denies certain veterans benefits to individuals entitled to those benefits. This regulation exceeds the statutory authority of its promulgators, creates an irrebutable presumption in violation of the due process clause of the Fifth Amendment, denies those veterans who suffer from alcoholism not caused by "willful misconduct" the equal protection of the laws guaranteed by the Fifth Amendment, and discriminates against the handicapped in violation of the Rehabilitation Act of 1973.

Jurisdiction and Venue

1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1331 and 1361, and 29 U.S.C. § 794a(a)(2).

2. Venue is proper in this judicial district, in accordance with 28 U.S.C. § 1391(e), because this district is the official residence of defendants.

Parties

3. Plaintiff JAMES P. McKELVEY is a veteran who served in the United States Army from September 1963 to September 1966, and who received an honorable discharge. Mr. McKelvey is a citizen and resident of the State of Maryland.

4. Defendant HARVEY N. WALTERS is the Administrator of Veterans Affairs in Washington, D. C. Defendant is sued in his official capacity. As Administrator, he is responsible for executing the laws relating to veterans benefits and for promulgating regulations that are consistent therewith.



5. Defendant VETERANS ADMINISTRATION is that part of the executive branch responsible for administering the laws relating to veterans benefits. 38 U.S.C. § 210.

FACTS

6. Congress has provided certain educational benefits for veterans that are administered by defendants. James P. McKelvey's honorable service in the United States Army entitled him to these benefits, which, under 38 U.S.C. §§ 1661 and 1662(a)(1), must have been used within ten years after his discharge. Section 1662(a)(1) extends the delimitating date if an educational program could not be initiated or completed within the ten-year period because of a disability that was not the result of the veteran's own "willful misconduct." Defendants have denied Mr. McKelvey an extension of time solely

because of a regulation that conclusively and irrebuttably defines alcoholism as "willful misconduct."

7. Mr. McKelvey began drinking alcoholic beverages at age 13. Both his father and an older brother were alcohol abusers and died as a result of alcohol-related causes.

8. On September 9, 1963, Mr. McKelvey enlisted in the United States Army. During his enlistment, he received several disciplinary sanctions, all drinking-related. He was honorably discharged from the Army on or about September 9, 1966.

9. From 1971 to 1975, Mr. McKelvey underwent 33 successive hospitalizations for alcoholism and/or psychiatric disorders. Between hospitalizations, Mr. McKelvey attended two different educational institutions at which he used his veterans benefits. He

was unable to complete either program because of the debilitating effects of his alcoholism.

10. Mr. McKelvey had his last drink of an alcoholic beverage on or about May 10, 1975. He subsequently received regular psychiatric treatment for depression and phobias. He has been employed on a full-time basis since July, 1975, and for the past four years has been employed by Montgomery County, Maryland, as an alcoholism counselor.

11. On September 9, 1976, the statutory delimiting date for Mr. McKelvey's educational benefits took effect. On November 10, 1977, Mr. McKelvey filed, pursuant to 38 U.S.C. § 1662(a), an application for extension of that delimiting date with defendant Veterans Administration.

12. The Veterans Benefit Law defines "disability" for purposes of

determining claims for veterans benefits, and for determining requests for extensions of time pursuant to 38 U.S.C. § 1662(a)(1), as meaning "a disease, injury, or other physical or medical defect." 38 U.S.C. § 601(1).

13. Alcoholism is a "disability" within the meaning of 38 U.S.C. §§ 601(1) and 1662(a)(1).

14. The Veteran's Benefit Law does not define "willful misconduct." Defendants' pertinent regulation, 38 C.F.R. § 3.301(c)(2), provides as follows:

The simple drinking of alcoholic beverage is not of itself willful misconduct. The deliberate drinking of a known poisonous substance or under conditions which would raise a presumption to that effect will be considered willful misconduct. If, in the drinking of a beverage to enjoy its intoxicating effects, intoxication results approximately and immediately in disability or death, the disability or death will be considered the result of the person's willful misconduct. Organic diseases and

disabilities which are a secondary result of the chronic use of alcohol as a beverage, whether out of compulsion or otherwise, will not be considered of willful misconduct origin.

15. Mr. McKelvey's application was denied solely on the ground that under Veterans Administration regulations, 38 C.F.R. § 3.301(c)(2), alcoholism is considered "willful misconduct," and thus is barred as a basis for extension of benefits under 38 U.S.C. § 1662(a)(1).

16. The denial of Mr. McKelvey's application was appealed timely and in accordance with Veterans Administration procedures. On August 6, 1980, the Board of Veterans Appeals denied the appeal solely on the basis of 38 C.F.R. § 3.301(c)(2). It refused to consider any evidence that Mr. McKelvey's alcoholism was not caused by "willful misconduct," concluding that it

was bound by defendants' regulation.

17. Mr. McKelvey filed a request for reconsideration with the Board on August 4, 1981. On February 23, 1982, the Board affirmed its prior decision.

18. Mr. McKelvey has exhausted his administrative remedies.

Claims for Relief

19. Alcoholism is not necessarily caused by "willful misconduct" and thus may constitute a disability within the meaning of 38 U.S.C. § 1662(a)(1). Mr. McKelvey's alcoholism was not caused by "willful misconduct," and was a disability under the statute. Consequently, Mr. McKelvey was entitled to an extension of his delimiting date.

20. Defendants' regulation, 38 C.F.R. § 3.301(c)(2), denies veterans suffering from alcoholism not caused by "willful misconduct" those educational



benefits to which they are entitled by Act of Congress, and therefore exceeds defendants' statutory authority under 38 U.S.C. § 210(c)(1).

21. Moreover, defendants' regulation creates an irrebuttable presumption in violation of the due process clause of the Fifth Amendment, and further violates the Fifth Amendment by denying the equal protection of the laws to veterans who suffer from alcoholism not caused by "willful misconduct."

22. The Rehabilitation Act of 1973, as amended in 1978, 29 U.S.C. § 706(7), provides that persons with a history of alcoholism are "handicapped" and entitled to its protection. Defendant Veterans Administration is required to comply with Section 504 of the Act, 29 U.S.C. § 794, which provides in pertinent part:

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from participation, be denied the benefits of, or be subjected to discrimination under any program or activity . . . conducted by any Executive Agency . . . .

The Act further provides that defendants "shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation . . . Act of 1978." Defendants have failed to review their existing regulations and to promulgate new regulations which satisfy their obligations under the Rehabilitation Act, as amended, and have otherwise violated plaintiff's statutory right to nondiscrimination.

23. As a result of defendants' misconduct, plaintiff has suffered and will continue to suffer irreparable injury. Among other things,



he has been unable to complete a course of study which would enable him to pursue his desired occupation, and has therefore lost several years during which he could have utilized his skills and experience in the manner most beneficial both to himself and to society. He has also been stigmatized, as have all veterans suffering from the disease of alcoholism, by defendants' insistence, contrary to medical evidence, that he was the sole cause of the disease from which he suffered.

24. As a further result of defendants' misconduct, plaintiff has suffered monetary damages in an amount of not less than \$2,000 for expenses incurred in pursuing an education that should properly have been borne by defendants, and will suffer further damages in the pursuit of his education absent the relief requested.

WHEREFORE, plaintiff requests the Court to:

(A) Enter a declaratory judgment that the challenged regulation, 38 C.F.R. § 301(c)(2), violates 38 U.S.C. §§ 210(c)(1), 1661 and 1662(a)(1), the due process and equal protection clauses of the Fifth Amendment, and 29 U.S.C. §§ 706(7) and 794.

(B) Issue a permanent injunction:

1. Restraining defendants and their agents and appointees from applying 38 C.F.R. § 301(c)(2) to plaintiff;

2. Granting plaintiff's application for an extension of his delimiting date or, alternatively, remanding the case to defendant Veterans Administration with directions that defendants reconsider Mr. McKelvey's

application without regard to 38 C.F.R.  
§ 3.301(c)(2); and

3. Requiring defendants  
to amend and promulgate regulations by  
Section 504 of the Rehabilitation Act of  
1973, as amended, 29 U.S.C. § 794, and  
to do so pursuant to the procedures set  
forth in the Administrative Procedure  
Act, 5 U.S.C. § 553, and 38 C.F.R.  
§ 1.12.

(C) Award plaintiff his  
damages.

(D) Award plaintiff the costs  
of this action, including reasonable  
attorneys fees.

(E) Grant plaintiff such  
other and further relief as may be  
appropriate.

Respectfully submitted,

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Date: July 19, 1983

SUPREME COURT OF THE UNITED STATES

No. 86-737

James P. McKelvey,

Petitioner

v.

Thomas K. Turnage, Adminis-  
trator, Veterans Adminis-  
tration, et al.

ORDER ALLOWING CERTIORARI.  
Filed March 9, 1987.

The petition herein for a writ of certiorari [to] the United States Court of Appeals for the District of Columbia is granted. This case is consolidated with 86-622, Eugene Traynor v. Thomas K. Turnage, Administrator, Veterans Administration, et al., and a total of one hour is allotted for oral argument.

Justice Scalia took no part in the consideration or decision of this petition.

ADMINISTRATOR'S DECISION, VETERANS'  
ADMINISTRATION, NO. 2

March 21, 1931.

Subject: Interpretation of term "willful misconduct" in disability allowance provision.

QUESTION PRESENTED: Whether certain veterans who are suffering from jaic paralysis are barred from receiving disability allowance on the theory that the disability is the result of their own willful misconduct.

COMMENT: Claimants are suffering from paralysis caused by drinking so-called jamaica ginger. The second paragraph of section 200 of the World War Veterans' Act, as amended July 3, 1930, authorizes the payment of disability allowance to "any honorably discharged

ex-service man who entered the service prior to November 11, 1918, and served 90 days or more during the World War, and who is or may hereafter be suffering from a 25 per centum or more permanent disability, as defined by the director, not the result of his own wilful misconduct \* \* \*."

In passing on the question as to whether a claimant who became blind from wood alcohol poisoning as result of drinking whiskey, was entitled to disability allowance, the Attorney General of the United States in an opinion dated January 20, 1931, held that the phrase "wilful misconduct" involves something in the nature of conscious wrongdoing and said:

There being no law prohibiting the drinking of intoxicating liquor, no evidence that the veteran knew the liquor might blind him, in short, no evil intent of any kind, I am of the opinion that the veteran is eligible to receive a disability allowance.

The Attorney General further referred to the fact that the Supreme Court of the United States in the case of United States v. Farrar, 281 U.S. 624, held that the ordinary purchaser of intoxicating liquor is not subject to prosecution under the National Prohibition Act. It follows that a disability resulting from drinking jamaica ginger, a substitute for intoxicating liquor, is not, generally speaking, the result of the claimant's own wilful misconduct. This rule can not be applied to bring in all cases of disability resulting from drinking jamaica ginger nor all of those in which disability is due to the drinking of whiskey or other intoxicants. The main principle involved is that the simple drinking of any alcoholic beverage, whether jamaica ginger, whiskey or other liquor, is not in and of itself wilful misconduct. However, in the event other



circumstances exist in a given case, such as deliberate drinking where the drink was known to be poisonous, or under conditions which would raise a presumption to the effect, the element of wilful misconduct immediately assumes proportions. Further, if in the drinking of any beverage for the purpose of enjoying its intoxicating effects, excessive indulgence leads to disability, wilful misconduct would undoubtedly inhere in the act but where, as is true in the jaic paralysis cases which are presented here for consideration, indulgence leads to disability because the beverage itself is poisonous and essentially destructive of life and health, although the drink which they believe they are taking would not be, wilful misconduct can not be found in the absence of other circumstances from which it can be imputed. An examination

of the three cases submitted for decision does not disclose any evidence along this latter line.

HELD: The claimants are not within the prohibition of the misconduct clause of the disability allowance provision. (Decision of the Administrator of Veterans' Affairs, dated Mar. 13, 1931.)

The foregoing decision is hereby promulgated for observance by all officers and employees of the Veterans' Administration.

FRANK T. HINES,  
Administrator of Veterans'  
Affairs.

ADMINISTRATOR'S DECISION, VETERANS'  
ADMINISTRATION NO. 988, August 13, 1964

Subject: INTERPRETATION OF THE TERM  
"WILLFUL MISCONDUCT" AS RELATED TO  
THE RESIDUALS OF CHRONIC ALCOHOLISM

QUESTION PRESENTED: Whether changes  
should be made in the criteria currently  
followed for determining when disability  
or death is the result of the veteran's  
own willful misconduct because of use of  
alcohol as a beverage.

COMMENTS: Statutes currently  
authorizing disability and death com-  
pensation, dependency and indemnity  
compensation, and pension benefits  
preclude payment of such benefits when it  
is determined that the disability or  
death is the result of the veteran's own  
willful misconduct. See for example 38  
U.S.C. 105, 310, 410(a) and 521(a). The  
provisions thereof respecting willful

misconduct are similar to corresponding  
ones in earlier statutes previously in  
effect for many years. See section 300  
of the former War Risk Insurance Act and  
section 200 of the former World War  
Veterans' Act, 1924. Of note also are  
similar provisions in the former  
Veterans' Regulation No. 10, with respect  
to benefits under Public No. 2, 73d  
Congress.

Criteria now applicable generally  
for determining when disability or death  
is the result of misconduct because of  
the use of alcohol as a beverage are set  
out in Administrator's Decision No. 2  
promulgated March 21, 1931. Such general  
criteria are summarized in paragraph  
14.04c of M21-1, in part, as follows:

"Basic principles for application in  
deciding cases involving alcoholism

are stated in Administrator's Decision No. 2, under which a finding of willful misconduct is to be made where a veteran drinks a poisonous beverage (methyl alcohol), knowing it to be poisonous or under circumstances that would raise a presumption to that effect, or when he drinks any alcoholic beverage for the purpose of enjoying its intoxicating effects and indulges to such an extent that his excessive indulgence results in a disease or disability. Excessive indulgence is not confined to the cases of chronic alcoholics and the fact that a veteran was not a chronic alcoholic is not material. The question involved is: Was there excessive indulgence and was it the proximate cause of the injury or disease in question."

In the present VA Regulation 1001(N) it is said that willful misconduct "means an act involving conscious wrongdoing or known prohibited action"; and that "it involves deliberate or intentional wrongdoing with knowledge of or wanton and reckless disregard of its probable consequences." The regulation provides further that "willful misconduct will not be determinative unless it is the proximate cause of injury, disease or death."

The injurious effects of drinking alcohol may be placed generally into two distinct groups:

(a) The proximate and immediate effects consisting of disabling injuries or death resulting from a state of intoxication, and,

(b) The remote, organic secondary effects of the continued use of alcohol resulting in impairment of body organs or systems leading to disability or death.

One can, and very reasonably should, be held responsible for the extent and degree of his own drunkenness on individual occasions. So, to willingly achieve a drunken state and while in this condition to undertake tasks for which his condition renders him physically and mentally unqualified, is to act "with wanton and reckless disregard" of the probable consequences of drinking. Such, of course, is willful misconduct. In misconduct determinations, however, with respect to mental disorders where the use of alcohol as a beverage has been involved, a distinction has heretofore been recognized between alcoholism as a

primary condition (or as secondary to an underlying personality disorder), and alcoholism as secondary to and a manifestation of an acquired psychiatric disorder. If the latter condition is found the resulting disability or death is not to be considered as willful misconduct.

The principle thus recognized is applicable to other than mental disorders. With common social acceptance of the use of alcohol as a beverage, onset of the secondary condition may be very insidious in its development. Under such circumstances the development of the secondary condition does not meet the definition of intentional wrongdoing with knowledge or wanton disregard of its probable consequences. Secondary results are not the usual and probable effects of drinking alcohol as a beverage. By the



time there is sufficient awareness of any probable deleterious consequences, the process has developed to a point where it is irreversible without professional help. At such time, the person by himself, may lack the capacity to avoid the continued use of alcohol. While it is proper to hold a person responsible for the direct and immediate results of indulgence in alcohol, it cannot be reasonably said that he expects and wills the disease and disabilities which sometimes appear as secondary effects. These may range from cirrhosis of the liver to gastric ulcer, peripheral neuropathy, vitamin deficiency, chronic brain syndrome or simply acceleration of debility of age. These diseases also appear in the population without any relation to alcohol. Such resulting secondary conditions may properly be

excluded in the criteria respecting willful misconduct without doing harm to the language or intent of the applicable statutes.

It should be noted, further, that, historically, the question of willful misconduct has never been raised in other related situations where personal habits or neglect are possible factors in the incurrence of disability. For example, the harmful effects of tobacco smoking on circulation and respiration were known long before tobacco was incriminated as a causative factor in the high incidence of cancer, emphysema and heart disease. Yet smoking has not been considered misconduct. It is unreasonable and illogical to apply one set of rules with respect to alcohol and a different one in a situation closely analogous.

HELD: Current criteria concerning the use of alcohol as a beverage and its consequences will be continued except that organic diseases and disabilities which are a secondary result of the chronic use of alcohol as a beverage, whether out of compulsion or otherwise, will not be considered of willful misconduct origin. Administrator's Decision No. 2 is modified accordingly.

This opinion is hereby promulgated for observance by all officers and employees of the Veterans' Administration.

/s/ J. S. GLEASON, Jr.

Administrator

Veterans Administration  
Program Guide PG21-1  
November 9, 1976

Section 0-17  
(Revised)  
Change 243

RATING PRACTICES AND PROCEDURES

DISABILITY

MISCONDUCT

Organic Disablement Due to Alcohol. Administrator's Decision 988 removed from the category of misconduct organic disablement which is a secondary result of the use of alcohol as a beverage. This change supersedes the longstanding rule set forth in A.D. 2 which held that willful misconduct would inhere in the act of drinking alcoholic beverages where excessive indulgence led to disability. This change of policy is based on the principle that it cannot be maintained that the veteran expects and "wills" the diseases and disabilities which sometimes appear as secondary effects because of indulgence in alcohol.

The bad effects of drinking alcoholic beverages can be placed generally into two distinct groups:

(a) The proximate and immediate effects consisting of disabling injuries or death resulting from a state of intoxication.

(1) No change is made in the existing rule under which disability or death due to automobile, household or other accidents directly resulting from acute intoxication are classified under willful misconduct.

(2) Injury or death caused by fighting, misuse of firearms, etc., directly and proximately resulting from drunkenness are not compensable or pensionable under this revision.

(b) The remote, organic secondary effect of the continued use of alcohol resulting in impairment of body

organs or systems leading to disability or death.

(1) Under this revision, organic diseases and disabilities which are a secondary result of the chronic use of alcohol as a beverage, whether out of compulsion or otherwise, should not be considered to be of willful misconduct origin.

(2) These conditions may range from cirrhosis of the liver to gastric ulcer, peripheral neuropathy, vitamin deficiency, chronic brain syndrome or simply acceleration of disability of age.

The provisions of VA Regulation 1114(A) are applicable to this liberalization. Benefits under this revision may not be awarded prior to the date of approval, August 13, 1964.

Claims will be adjudicated under this change of policy as they are encountered in the course of otherwise required adjudication.

\* \* \* \*

#### 4.04 EXTENSION OF DELIMITING DATE BASED ON DISABILITY

(a) General. The delimiting date of a veteran . . . may be extended if it is determined that he or she was prevented from initiating or completing a chosen program of education because of a physical or mental disability.

(1) In this context, the term, "program of education" refers to a course or curriculum pursued in an educational institution or training establishment (38 U.S.C. 1652(b) and (c), and 1787(c)).

(2) Physical or mental disabilities which result from the

applicant's own misconduct do not qualify the person for an extension of his or her delimiting date.

(3) The length of any extension granted will equal the length of time it is determined that the eligible person was prevented from initiating or completing a program of education within the basic 10-year period of eligibility.

(4) These provisions are retroactive to May 31, 1976.

(b) Application Date. Applications for an extension of a delimiting date under this provision must be received in the VA by the latest of the following dates:

(1) November 23, 1978; or

(2) One year after the veteran's basic delimiting date; or

(3) One year after the date on which the veteran became able to initiate or continue training following



recuperation from the disability.

(c) Application Forms.

\* \* \* \*

d. Required Information on Application. Both a statement from the claimant and supporting medical evidence will be required to establish eligibility to an extended delimiting date based on disability.

(1) Statement From Claimant. The claimant must submit a signed statement containing the following information:

(a) The type of disability claimed.

(b) The beginning and ending dates of any period or periods during which the claimant was unable to pursue training because of the claimed

disability, and the claimant's reason(s) for being unable to begin or continue his or her training program due to the disability.

(c) The claimant's statement of how the disability was incurred, if known.

(d) A statement of the claimant's employment history during the period that he or she was unable to pursue training because of the disability. Dates and weekly hours of employment, names and addresses of employers, and types of jobs held should be specified.

(2) Medical Evidence. Medical evidence clearly establishing the nature and duration of the

disability must be submitted. Such evidence will consist of:

(a) A statement by an attending physician, reporting diagnosis and treatment, the period(s) of disability, and the physician's prior and current evaluation of the feasibility of employment or training for the claimant. The statement should also indicate the date(s) when, in the opinion of the physician, training was first medically feasible.

(b) Other supporting evidence, such as hospital reports or results of laboratory tests.

(c) If, after full development, the claimant is unable to furnish medical

evidence of a disability, the claim will be disallowed with referral to the rating board.

e. Determinations. A favorable decision to extend a claimant's delimiting date under this provision requires the finding of the existence of a physical or mental disability which precluded training, establishment of the duration of such a disability, and a finding of the absence of willful misconduct on the part of the claimant for incurrence of the disability.

(1) Rating Decisions. Judging the existence of a physical or mental disability will be the responsibility of a VA rating board and will include establishment of the beginning and ending dates for the period or periods during which training was precluded by disability. These decisions will be

presented in a memorandum rating.  
(See M21-1, Ch. 47, par. 47.17.)

(a) Existence of a physical or mental disability which precluded training will be found if medical evidence clearly establishes a diagnosable disease, injury, or other defect judged to have made training medically infeasible.

(b) Notwithstanding medical evidence of a disability, medical infeasibility of training ordinarily may not be found for any period during which the claimant was employed full time. However, the rating board will ensure (1) that such employment was not part of a medically prescribed rehabilitation program; or (2) did not otherwise indicate an inability

to pursue training effectively before finding that training was not precluded.

(2) Willful Misconduct. When necessary, determinations concerning willful misconduct will be made in accordance with M21-1, chapter 14, paragraph 14.04. If such a decision is within the jurisdiction of the rating board (cases involving disease, paragraph 14.04e(1)), the decision will be incorporated in the memorandum rating. Otherwise, a separate administrative decision prepared by the Authorization activity is required.

(3) Disabilities of Less Than 30 Days' Duration. A disability of less than 30 days' duration will not entitle a claimant to a delimiting date extension unless the claimant

shows exceptional circumstances which prevented him or her from enrolling or reenrolling in the chosen program of education, or the claimant was forced to discontinue attendance because of the short disability. A statement from the claimant citing the specific circumstances (for example, registration or examination dates with which the disability interfered) will be accepted in the absence of contradictory information.

(a) If, after the rating board was determined the inclusive dates when training was not medically feasible, the evidence of record does not warrant a finding that the brief period of disability

prevented enrollment or reenrollment, the claim will be disallowed.

(b) A dictated letter of disallowance will inform the claimant of the period during which the VA has determined training was not medically feasible. The letter will explain why the evidence does not establish acceptable exceptional circumstances which would have prevented enrollment or reenrollment during the period of disability.

(c) If the claimant later submits additional evidence of exceptional circumstances, eligibility to an extension of delimiting date will be reconsidered.

\* \* \* \*



f. Length of Period of Disability.

The length of the period of disability will be determined by an adjudicator as follows:

(1) Beginning Date. The beginning of the period will be the first day of the claimant's 10-year delimiting period or the first day on which the claimant's disability rendered training medically infeasible (as determined by the rating board), whichever is later.

(2) Ending Date. The ending of the period will be the earliest of the following dates:

(a) The date of the first ordinary term (summer sessions are excluded) following the date on which training became medically feasible.

\* \* \* \*

(b) The date on which the claimant enrolled or reenrolled after the period of disability if such date precedes the date specified in subparagraph (a) above.

(c) The claimant's basic delimiting date. NOTE: The length of any extension granted on account of disability will not provide any individual with more than ten years of eligibility during which training was medically feasible.

g. Chosen Program of Education. The claimant may select any approved program of education during an extended delimiting period, provided that the program selected would have been available to the claimant during his or her basic period of eligibility at the time disability prevent training.

\* \* \* \*

h. Determining Beginning and Ending Dates.

(1) Beginning Date. The claimant will elect the effective (beginning) date of the extended delimiting period:

(a) This elected date may be as early as the claimant's basic delimiting date or as late as the first day of the first ordinary term (excluding summer session) at the claimant's school which begins 90 days or more after VA approval of the delimiting date extension.

(b) An explanation of this election, including a statement of the date which appears most advantageous to the claimant (if this can be determined), will be included

in the notification of approval sent to the claimant.

(c) The claimant will also be informed that this election, once it has been made, is irrevocable.

(2) Ending Date. The ending date of the extended period will be established by adding the length of the period of disability determined under subparagraph f above to the beginning date of the extended period. The day after this ending date becomes the claimant's new delimiting date for educational benefit purposes. Once an extended delimiting date has been granted, it will not be extended further because of either recurrence of disability or the onset of a new disability when such recurrence or onset is

after the claimant's basic delimiting date. Although benefit payments may be made up to the new delimiting date, payments will not be continued beyond the limits of the veteran's entitlement, but see paragraph 5.03 regarding allowable extensions of entitlement.

i. Notification to the Claimant.

(1) Disallowances. The claimant will be informed of a disallowance of an application for extended delimiting date by dictated letter giving the specific reason for disallowance and enclosing full statement of appellate and procedural rights.

(2) Approvals. If the application for an extended delimiting date is approved, the claimant will be

notified at once by dictated letter. The following information will be included on the notification:

(a) The length of time the extended period will run, and a clear explanation of how this period was determined.

(b) An explanation of the possible beginning dates for the extended delimiting period as specified in subparagraph h(1) above and a request for the claimant's election of the beginning date. VA Form 21-4138 will be enclosed for the claimant's use. He or she must also be made aware that the election will be final after it is made and the extended delimiting period will run continuously from the chosen beginning date.

(c) The claimant will be informed of the approval or disapproval of the program of education for which he or she has applied. If no program has been indicated by the claimant, the claimant will be asked to furnish to statement which identifies his or her chosen program. The availability of VA counseling will also be explained.

(d) Notice of appeal and procedural rights will be enclosed.

VA Manual M21-1

Change 239

August 21, 1979

#### 14.04 WILLFUL MISCONDUCT AND VICIOUS HABITS DETERMINATIONS

a. General. Willful misconduct is basically the intentional doing of something either with knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of its probable consequences.

(1) A determination will be made as to willful misconduct when a death or disability which affects entitlement was incurred under questionable circumstances.

(2) The principles stated in paragraph 14.03a regarding circumstances which do not warrant raising questions as



to line of duty are applicable to willful misconduct. (See VAR 1001(N).)

b. Proximate Cause. Injury may not be held due to willful misconduct on the basis of an act "malum in se" or "malum prohibitum" unless the wrongful act was in and of itself the proximate cause of the resulting injury.

c. Alcoholism. Basic principles for application in deciding cases involving alcoholism are stated Administrator's Decision No. 988, which classifies the injurious effects of drinking alcohol into two distinct groups.

(1) Proximate and Immediate Effects. A person will be held responsible for disabling injuries or death which resulted directly and immediately from indulgence in alcohol in an individual occasion. The willingness to achieve a drunken state and while in this condition to undertake tasks for which

unqualified physically and mentally by alcohol is willful misconduct.

(a) Determinations [of willful misconduct in such cases] will depend upon the facts found in the individual cases, but care should be exercised to guard against findings of willful misconduct on the basis of inconclusive evidence. [An adverse determination requires that] there must be excessive indulgence which was the proximate cause of the disability or death in question.

\* \* \* \*

(2) Organic Secondary Effects. Organic diseases and disabilities which are a secondary result of the chronic use of alcohol as a beverage, whether out of compulsion or otherwise are not to be considered of a willful misconduct origin. The development of the secondary condition does not meet the definition of intentional wrongdoing with knowledge or

wanton disregard of its probable consequences.

\* \* \* \*

e. Responsibility For Determinations

(1) Willful Misconduct. The rating board will determine the issue in cases involving disease or suicidal death (VAR 1301 and 1302). All other determinations are the responsibility of the Authorization unit.

(2) Vicious Habits. The meaning of "vicious habits" is stated in VAR 1301(B) and its application is limited to disability pension cases. The significance is usually medical in nature and when related to etiology of a disease the question is for consideration by the rating board.

**BEST AVAILABLE COPY**

# **PETITIONER'S BRIEF**

**MAY 28 1987**

JOSEPH F. SPANIOLO, JR.  
CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1986

EUGENE TRAYNOR,

*Petitioner,*

v.

THOMAS K. TURNAGE, ADMINISTRATOR OF VETERANS' AFFAIRS,  
and VETERANS' ADMINISTRATION,

*Respondents.*

JAMES P. MCKELVEY,

*Petitioner,*

v.

THOMAS K. TURNAGE, ADMINISTRATOR OF VETERANS' AFFAIRS,  
and VETERANS' ADMINISTRATION,

*Respondents.*

**On Writs of Certiorari to the United States  
Courts of Appeals for the Second Circuit and the  
District of Columbia Circuit**

**BRIEF FOR PETITIONERS**

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**QUESTIONS PRESENTED**

1. Whether a Veterans' Administration regulation that conclusively defines alcoholism as willful misconduct discriminates against the handicapped in violation of § 504 of the Rehabilitation Act of 1973?
2. Whether the federal courts have jurisdiction to consider a challenge to the validity of a Veterans' Administration regulation that violates § 504 of the Rehabilitation Act of 1973?

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IN THE  
**Supreme Court of the United States**  
 OCTOBER TERM, 1986

\_\_\_\_\_  
 Nos. 86-622 and 86-737  
 \_\_\_\_\_

EUGENE TRAYNOR,  
*Petitioner,*

v.

THOMAS K. TURNAGE, ADMINISTRATOR OF VETERANS'  
 AFFAIRS, and VETERANS' ADMINISTRATION,  
*Respondents.*

\_\_\_\_\_  
 JAMES P. MCKELVEY,  
*Petitioner,*

v.

THOMAS K. TURNAGE, ADMINISTRATOR OF VETERANS'  
 AFFAIRS, and VETERANS' ADMINISTRATION,  
*Respondents.*

\_\_\_\_\_  
**ON WRITS OF CERTIORARI  
 TO THE UNITED STATES COURTS OF APPEALS  
 FOR THE SECOND CIRCUIT AND THE  
 DISTRICT OF COLUMBIA CIRCUIT**  
 \_\_\_\_\_

This brief is submitted on behalf of Eugene Traynor, petitioner in No. 86-622, and James P. McKelvey, petitioner in No. 86-737. Mr. Traynor seeks the reversal of a decision of the United States Court of Appeals for the Second Circuit; Mr. McKelvey seeks

the reversal of a portion of a decision of the United States Court of Appeals for the District of Columbia Circuit.

### OPINIONS BELOW

The majority and dissenting opinions of the Second Circuit in *Traynor* are reported at 791 F.2d 226 (2d Cir. 1986) (*Traynor* Cert. Pet. 1a-38a). The opinion of the district court is reported at 606 F. Supp. 391 (S.D.N.Y. 1985) (*Traynor* Cert. Pet. 39a-82a).

The majority and dissenting opinions of the D.C. Circuit in *McKelvey* are reported at 792 F.2d 194 (D.C. Cir. 1986) (*McKelvey* Cert. Pet. 1a-31a). The opinion of the district court is reported at 596 F. Supp. 1317 (D.D.C. 1984) (*McKelvey* Cert. Pet. 32a-47a).

### JURISDICTION

The judgment of the Court of Appeals in *Traynor* was entered on May 16, 1986, and a timely motion for rehearing and rehearing *en banc* was denied on July 15, 1986. (*Traynor* Cert. Pet. 1a, 81a.) Mr. Traynor's petition for writ of certiorari was filed on October 14, 1986.

The judgment of the Court of Appeals in *McKelvey* was entered on May 30, 1986, and a timely motion for rehearing and rehearing *en banc* was denied on August 7, 1986. (*McKelvey* Cert. Pet. 48a, 49a, 50a.) Mr. McKelvey's petition for writ of certiorari was filed on November 5, 1986.

Both petitions for certiorari were granted on March 9, 1987. J.A. 132. The jurisdiction of this Court in

both cases is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

### STATUTES AND REGULATIONS INVOLVED

Section 504 of the Rehabilitation Act of 1973, 92 Stat. 2982, 2987 (1978), 29 U.S.C. § 794 (1982), provides in pertinent part:

No otherwise qualified individual with handicaps in the United States, as defined in § 706(8) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive Agency . . . .

Section 7(8) of the Rehabilitation Act of 1973, 92 Stat. 2984, 2985 (1978), 29 U.S.C. § 706(8) (1982), defines "individual with handicaps" as follows:

(A) Except as otherwise provided in subparagraph (B), the term 'individual with handicaps' means any individual who (i) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (ii) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to subchapters I and III of this chapter.

(B) Subject to the second sentence of this subparagraph, the term "individual with handicaps" means, for purposes of subchapters IV and V of this chapter, any person

who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. For purposes of sections 793 and 794 of this title as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

Time limitations for using veterans' educational benefits are established by 91 Stat. 1439 (1977), 38 U.S.C. § 1662(a)(1) (1982), which provides in pertinent part:

No educational assistance shall be afforded an eligible veteran under this chapter beyond the date 10 years after the veteran's last discharge or release from active duty after January 31, 1955; except that, in the case of any eligible veteran who was prevented from initiating or completing such veteran's chosen program of education within such time period because of a physical or mental disability which was not the result of such veteran's own willful misconduct, such veteran shall . . . be granted an extension of the applicable delimiting date for such length of time as the Administrator determines, from the evidence, that such veteran was so pre-

vented from initiating or completing such a program of education.

Jurisdiction to review certain Veterans' Administration decisions is limited by 84 Stat. 787, 790 (1970), 38 U.S.C. § 211(a) (1982), which provides as follows:

(a) On and after October 17, 1940, except as provided in sections 775, 784, and as to matters arising under chapter 37 of this title, the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

The term "willful misconduct" is defined generally under Veterans' Administration regulations at 38 C.F.R. § 3.1(n) (1986):

"Willful misconduct" means an act involving conscious wrongdoing or known prohibited action (*malum in se* or *malum prohibitum*). A service department finding that injury, disease or death was not due to misconduct will be binding on the Veterans Administration unless it is patently inconsistent with the facts and the requirements of laws administered by the Veterans Administration.

(1) It involves deliberate or intentional wrongdoing with knowledge of or wanton and



reckless disregard of its probable consequences.

(2) Mere technical violation of police regulations or ordinances will not per se constitute willful misconduct.

(3) Willful misconduct will not be determinative unless it is the proximate cause of injury, disease or death.

More specifically, a Veterans' Administration regulation codified at 38 C.F.R. § 3.301(c)(2) (1986) ("the willful misconduct regulation"), has been interpreted by the VA to define alcoholism as willful misconduct:

The simple drinking of alcoholic beverage is not itself willful misconduct. The deliberate drinking of a known poisonous substance or under conditions which would raise a presumption to that effect will be considered willful misconduct. If, in the drinking of a beverage to enjoy its intoxicating effects, intoxication results approximately and immediately in disability or death, the disability or death will be considered the result of the person's willful misconduct. Organic diseases and disabilities which are a secondary result of the chronic use of alcohol as a beverage, whether out of compulsion or otherwise, will not be considered of willful misconduct origin.

#### STATEMENT OF THE CASES

No. 86-622. Eugene Traynor is a veteran who began drinking to intoxication before he was ten years old. 606 F. Supp. at 393 (*Traynor* Cert. Pet. 41a). His

drinking became progressively worse, and while on active duty in the Army in 1968 and 1969 he suffered both seizures and disciplinary sanctions because of his alcoholism. He was honorably discharged from the Army on August 27, 1969. 606 F. Supp. at 393 (*Traynor* Cert. Pet. 42a-44a).

Between 1970 and 1974, Mr. Traynor was hospitalized repeatedly for alcoholism and related illnesses, and was diagnosed as having "primary" alcoholism, a term used by the Veterans' Administration ("VA") to denote alcoholism without an underlying psychiatric disorder. *Id.* During that time, his active alcoholism made it impossible for him to pursue any education, or to use veterans' educational assistance benefits to which he was entitled under 38 U.S.C. § 1661 (1982).

In 1974, following his last hospitalization, Mr. Traynor succeeded in overcoming his alcoholism. 606 F. Supp. at 394 (*Traynor* Cert. Pet. 46a). From 1977 until 1979, he attended college part-time, and used nine and one half of the 24 months of veterans' benefits to which he was entitled. 606 F. Supp. at 394 (*Traynor* Cert. Pet. 47a-49a). His original ten-year delimiting period for using those benefits expired on August 27, 1979. *See* 38 U.S.C. § 1662(a)(1) (1982).

In early 1979, Mr. Traynor applied for an extension of time to use his remaining benefits on the ground that his alcoholism had prevented him from pursuing his education until 1977. *See id.* Because the disability that delayed his education—"primary" alcoholism—is conclusively deemed as "willful misconduct" by the VA pursuant to 38 C.F.R. § 3.301(c)(2) (1986)<sup>1</sup>, the

<sup>1</sup> *See* p. 6 *supra*. This regulation is referred to throughout this brief as "the willful misconduct regulation."



VA denied the extension. 606 F. Supp. at 395 (*Traynor* Cert. Pet. 49a-50a); see also *id.* at 88a-89a (VA Rating Decision). His benefits were terminated on August 27, 1979.

Mr. Traynor appealed to the Board of Veterans' Appeals ("Board" or "BVA"). He argued, among other things, that the VA's classification of alcoholism as willful misconduct ignored established medical authority that alcoholism is an illness rather than deliberate conduct, and that the willful misconduct regulation violated the Constitution and the nondiscrimination mandate of the Rehabilitation Act. (*Traynor* Cert. Pet. 148a-149a; R. 8 (8/1/80 Hearing Tr. at 10-11, 15-22, 25-26, 28-30, 34-35)). Without even acknowledging these contentions, the Board denied his appeal on December 17, 1980. (*Traynor* Cert. Pet. 91a-102a).

On Mr. Traynor's motion for reconsideration, the Board again denied the appeal. (*Traynor* Cert. Pet. 103a-121a). The Board stated that it was not "the proper forum" for his constitutional and statutory challenges to the validity of the willful misconduct regulation, and concluded that it was "bound . . . by regulations of the Veterans Administration." (*Traynor* Cert. Pet. 107a-108a, 116a).

Mr. Traynor then brought an action for declaratory and related relief in the United States District Court for the Southern District of New York. He claimed that the willful misconduct regulation and its conclusive classification of "primary" alcoholism as "willful misconduct" were contrary to § 504 of the Rehabilitation Act, 29 U.S.C. § 794 (1982), as well as the Fifth Amendment to the Constitution. J.A. 8.

On cross-motions for summary judgment, the district court ruled that it had jurisdiction to review Mr. Traynor's challenges to the willful misconduct regulation, notwithstanding 38 U.S.C. § 211(a) (1982). 606 F. Supp. at 395-96 (*Traynor* Cert. Pet. 53a-59a). While finding that the regulation withstood constitutional scrutiny, 606 F. Supp. at 396-98 (*Traynor* Cert. Pet. 59a-65a), the district court recognized that the regulation's conclusive classification of "primary" alcoholism as "willful misconduct," which "exclud[ed] those with a history of primary alcoholism from consideration for extensions of delimiting dates[,] contravene[d] the Rehabilitation Act by discriminating against those rehabilitated alcoholics . . . most deserving of aid" solely on the basis of their handicap. 606 F. Supp. at 401 (*Traynor* Cert. Pet. 80a-81a). Declaring the regulation invalid under § 504 of the Rehabilitation Act, the court remanded the case to the VA for further proceedings. (*Traynor* Cert. Pet. 83a-84a).

On appeal, a divided panel of the Second Circuit reversed, holding that 38 U.S.C. § 211(a) precluded judicial review of Mr. Traynor's statutory challenge. The majority assumed that Mr. Traynor sought to overturn the VA's *application* of the challenged regulation to the facts of his case, and read § 211(a) to immunize from judicial review "all decisions of the VA on 'any question of law or fact.'" 791 F.2d at 229 (*Traynor* Cert. Pet. 13a). The Second Circuit therefore declined to reach the merits of the Rehabilitation Act claim. 791 F.2d at 226-231 (*Traynor* Cert. Pet. 1a-25a).

In dissent, Judge Kearse pointed out that, contrary to the majority's broad reading of the statutory lan-

guage, § 211(a) "immunizes from judicial review . . . only decisions of the VA on a 'question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans,' " 791 F.2d at 232 (*Traynor* Cert. Pet. 29a) (emphasis in original). She concluded for two reasons that § 211(a) does not deprive the federal courts of jurisdiction to determine whether the willful misconduct regulation violates § 504:

First, this question is not one that arises under a law that is administered by the VA or that provides benefits for veterans; rather it arises under the Rehabilitation Act, which does not provide veterans' benefits and is not administered by the VA. Second, the Administrator did not in fact decide this question but rather disclaimed jurisdiction to decide it.

791 F.2d at 232 (*Traynor* Cert. Pet. 28a-29a.)

No. 86-737. James P. McKelvey is a recovered alcoholic who began drinking at age 13. 596 F. Supp. at 1323 (*McKelvey* Cert. Pet. 43a). During his enlistment in the United States Army, he received several disciplinary sanctions, all of which were drinking-related. Mr. McKelvey was honorably discharged from the Army in September, 1966.

In the nine years after his discharge, Mr. McKelvey was hospitalized repeatedly for alcoholism and related problems. 792 F.2d at 187 (*McKelvey* Cert. Pet. 4a). Between hospitalizations, Mr. McKelvey attended two educational institutions, using veterans' educational benefits. 38 U.S.C. § 1661 (1982). He was unable to complete his education because of the debilitating ef-

fects of his alcoholism. R. 8 (transcript of July 1980 BVA hearing). Mr. McKelvey had his last drink of alcohol in May 1975. 792 F.2d at 197 (*McKelvey* Cert. Pet. 4a). He subsequently received regular psychiatric treatment. R. 8 (transcript of July 1980 BVA hearing).

On September 10, 1976, the ten-year delimiting date for use of Mr. McKelvey's educational benefits passed. In 1977, pursuant to 38 U.S.C. § 1662(a)(1) (1982), he sought an extension of his delimiting date on the ground that his alcoholism had prevented earlier use of his benefits. 792 F.2d at 197 (*McKelvey* Cert. Pet. 4a). His request was denied by the VA, which determined that Mr. McKelvey's disability had resulted from "willful misconduct." The VA's determination was based exclusively upon the willful misconduct regulation. *Id.* (*McKelvey* Cert. Pet. 4a-5a).

Mr. McKelvey appealed the VA's decision. In July 1980, at the Board of Veterans' Appeals hearing on Mr. McKelvey's case, the Chairman stated:

I want to make one thing clear . . . I am aware of the medical disagreement about what kind of an animal alcoholism is. As far as we are concerned at the Board of Veterans Appeals, we don't have discretion to say that primary alcoholism is a disease. It is defined in the regulations as willful misconduct and whether we want to call it a disease or not, we have no authority to do that, we're bound by those regulations . . . .

J.A. 83-84. Because the Board found "no evidence that an acquired psychiatric disease preceded [McKelvey's] alcoholism," it was thus bound by regulation



to hold that Mr. McKelvey's alcoholism was "willful," and it denied an extension. 792 F.2d at 197 (*McKelvey* Cert. Pet. 5a); see J.A. at 100-03, 114.

Mr. McKelvey challenged the Board's decision in the United States District Court for the District of Columbia. Mr. McKelvey raised both constitutional and statutory issues, including a claim that the willful misconduct regulation violated § 504 of the Rehabilitation Act, as amended, 29 U.S.C. § 794 (1982). The VA argued that 38 U.S.C. § 211(a) (1982) precluded judicial review. Judge Parker disagreed, stating that Mr. McKelvey did not "seek review of any factual findings of the Veterans Administration," but rather "a judicial determination that a regulation promulgated by the VA is contrary to § 504 of the Rehabilitation Act." 596 F. Supp. at 1320 (*McKelvey* Cert. Pet. 35a-36a). Judge Parker then granted summary judgment for Mr. McKelvey on the Rehabilitation Act claim, and remanded the case to the VA to consider whether Mr. McKelvey's alcoholism constituted willful misconduct within the meaning of 38 U.S.C. § 1662(a)(1) (1982). *Id.* at 1323-25 (*McKelvey* Cert. Pet. 41a-46a).

The VA sought review in the United States Court of Appeals for the District of Columbia Circuit. The D.C. Circuit noted that the VA initially had not contested the district court's finding of jurisdiction, and quoted from the VA's brief:

McKelvey did not make a Rehabilitation Act claim before the Board of Veterans Appeals; and it is not clear that the Board would have had authority to consider such a claim had

he made it. We do not read 38 U.S.C. § 211(a) to preclude judicial review of a point that the Veterans Administration never considered and, under existing regulations, probably had no authority to consider.

729 F.2d at 198 (*McKelvey* Cert. Pet. 7a).

At oral argument, the court invited the parties to address, among other things, whether the VA had authority to consider the Rehabilitation Act claim. In response, the VA submitted a letter from its General Counsel announcing for the first time the VA's official conclusion that the Rehabilitation Act does not invalidate the conclusive presumption of the willful misconduct regulation that "primary" alcoholism is in all cases willful misconduct. 792 F.2d at 198-199 (*McKelvey* Cert. Pet. 7a). The VA then asserted that the General Counsel's letter was a decision of the Administrator, which, having been made in the course of a benefits determination, was insulated from review under § 211(a). *Id.* (*McKelvey* Cert. Pet. 7a-8a).

The D.C. Circuit rejected the VA's belated reversal of position:

[T]hroughout this two and one-half year judicial proceeding, the VA now argues, it has held a trump card up its sleeve: even after the parties and two courts have expended the resources necessary for full and fair litigation, the VA, simply by releasing an official pronouncement on the matter *sub judice*, can preempt the judicial process, and convert the District Court's judgment into a declaration that merely advises, but does not control the agency.

We are confident that Congress never envisioned such a gambit when it provided that veterans benefits claims should start and finish at the administrative level without coming to court at all. Section 211(a)'s application is to be determined firmly and finally as of the date that plaintiff commences litigation. . . .

792 F.2d at 199 (*McKelvey* Cert. Pet. 8a-9a). The D.C. Circuit therefore concluded that it had jurisdiction over this case because the VA had "left a potentially dispositive question undecided." *Id.*<sup>2</sup>

On the merits of the Rehabilitation Act claim, Judges Starr and Scalia concluded that the willful misconduct regulation did not violate § 504 of the Rehabilitation Act. 792 F.2d at 199-203 (*McKelvey* Cert. Pet. 9a-16a). Judge Ginsburg dissented. *Id.* at 203-09 (*McKelvey* Cert. Pet. 17a-29a).

The majority reasoned that the willful misconduct regulation merely regulates the distribution of benefits on the basis of conduct. It held that the VA had reasonably defined alcoholism as a "willfully caused handicap," *id.* at 200 (*McKelvey* Cert. Pet. 11a), and stated that it was "initially the VA's responsibility, and not ours, to determine what is 'willful misconduct.'" *Id.* at 201 (*McKelvey* Cert. Pet. 13a). The majority concluded that the willful misconduct regulation "is a permissible means of discriminating among those suffering from alcoholism on the basis of their conduct." *Id.* (emphasis in original). In so holding, the

<sup>2</sup> Judge Scalia dissented from the court's holding with respect to jurisdiction, but because the court assumed jurisdiction he addressed the merits of the Rehabilitation Act question. 792 F.2d at 209 (*McKelvey* Cert. Pet. 30a).

majority explicitly recognized that its decision conflicted with *Tinch v. Walters* 765 F.2d 599 (6th Cir. 1985), in which the Sixth Circuit, facing the identical issue, had held that the willful misconduct regulation violates § 504. 792 F.2d at 201 n.4 (*McKelvey* Cert. Pet. 13a n.4).

In dissent, Judge Ginsburg examined the requirements for relief under § 504, and concluded that Mr. McKelvey satisfied each of them. She noted initially that alcoholics are "handicapped" under the Act, that the veterans' educational assistance program is subject to § 504, and that Mr. McKelvey is "otherwise qualified" to participate in the VA's educational benefit program. 792 F.2d at 204 (*McKelvey* Cert. Pet. 18a-19a). She then demonstrated that the majority's conclusion was wrong, noting that although the VA had purported to define alcoholism to be willful misconduct, Congress has deemed it to be a handicap under the Rehabilitation Act. She thus concluded that the VA's regulation discriminated on the basis of handicap. She observed that "under the majority's analysis, the government can never discriminate on the basis of alcoholism unless it explicitly admits that it is discriminating against alcoholics solely because they are handicapped. This mode of analysis effectively nullifies Section 504 coverage of alcoholics." 792 F.2d at 205 (*McKelvey* Cert. Pet. 21a).

## SUMMARY OF ARGUMENT

This brief addresses two questions. The principal question, raised in both cases, is whether the willful misconduct regulation discriminates against alcoholics in violation of § 504 of the Rehabilitation Act. The second question, raised only in *Traynor*, concerns a



jurisdictional issue: whether judicial review of the willful misconduct regulation is barred by 38 U.S.C. § 211(a) (1982), which explicitly bars only judicial review of certain VA decisions. With respect to the latter question, the D.C. Circuit in *McKelvey* concluded that the VA had never made a "decision" that might defeat jurisdiction, and therefore held that jurisdiction existed. 792 F.2d at 199 (*McKelvey* Cert. Pet. 8a-9a). In its brief in opposition to the petition for writ of certiorari, the VA did not challenge the D.C. Circuit's conclusion. Brief for Respondents in Opposition 12-13. Thus, regardless of how it resolves the jurisdictional issue, the merits of the Rehabilitation Act issue are squarely presented in *McKelvey*.

The principal issue before the Court is whether the willful misconduct regulation discriminates against the handicapped in violation of § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982). This question should be answered in the affirmative, for several reasons.

First, the proper § 504 analysis clearly demonstrates that the regulation is discriminatory. Petitioners are "individuals with handicaps" who were denied benefits available under a federal program only because the VA's willful misconduct regulation defines their handicap—alcoholism—to be willful misconduct.

Second, the D.C. Circuit's decision in *McKelvey* would potentially remove all alcoholics from the protection of the Rehabilitation Act, a result clearly contrary to Congressional intent. The D.C. Circuit majority concluded that the VA had reasonably determined that alcoholism is a willfully caused disability, and therefore that the willful misconduct regulation discriminates against alcoholics not on the

basis of their alcoholism, but on the basis of their conduct. This conclusion impermissibly separates the physical act of drinking from the causative condition, alcoholism, and cannot serve as the basis for allowing discrimination against alcoholics, which is prohibited by the Rehabilitation Act.

In addition, the D.C. Circuit's decision conflicts with this Court's recent decision in *School Board of Nassau County v. Arline*, 107 S. Ct. 1123 (1987). In *Arline*, the Court observed that the "basic purpose of § 504 . . . is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others." *Id.* at 1129. The willful misconduct regulation was upheld by the D.C. Circuit majority in part because it reflects "general societal perceptions regarding personal responsibility."<sup>3</sup> These "societal perceptions," if they exist, conflict with the definition of alcoholism Congress adopted as federal law in the Rehabilitation Act, and therefore, under *Arline*, cannot stand.

The second issue before the Court is the jurisdictional one, which is squarely raised only by *Traynor*. Section 211(a) of the Veterans' Benefits Law, 38 U.S.C. § 211(a) (1982), deprives the federal courts of jurisdiction to review certain "decisions of the Administrator" under statutes affording veterans' benefits. But it does not deprive the federal courts of jurisdiction to review claims that such VA regulations violate other federal laws. Here, petitioners' challenges are based on the Rehabilitation Act of 1973, which, as amended in 1978, prohibits all government agencies, including the VA, from discriminating against any individual on the basis of handicap. Ju-

<sup>3</sup> 792 F.2d at 201 (*McKelvey* Cert. Pet. 12a).

ditional review in these circumstances is permitted because § 211(a) bars only challenges to decisions “under [a] law administered by the Veterans’ Administration providing benefits to veterans . . . .” 38 U.S.C. § 211(a) (emphasis added). Petitioners’ challenge arises under a statute that provides protection to the handicapped—not benefits to veterans—and calls for an interpretation of a body of law entirely separate from the Veterans’ Benefits Law.

In addition, § 211(a) does not apply to petitioners’ cases because there was no “decision of the Administrator” on the question of law raised by these challenges. Throughout the administrative proceedings below, the VA consistently refused to decide whether the willful misconduct regulation conflicts with § 504 of the Rehabilitation Act. The VA’s position was that it was bound by the willful misconduct regulation, and could not consider its validity under other laws.

Nor can it be argued that VA regulations themselves are “decisions,” and therefore immune from review. Neither the language of the statute itself, available evidence of contemporary Congressional intent, or subsequent Congressional actions provides any indication that Congress intended § 211(a) to bar review of generally-applicable regulations.

Finally, permitting judicial review of the regulation would promote the goals of the Rehabilitation Act without thwarting the purposes of § 211(a). Allowing petitioners’ challenge to be heard would also comport with decisions of this Court which have established that judicial review is available where, as here, an agency has refused to rule on an important issue, or where an important and overriding issue is raised which is not within the agency’s special expertise.

## ARGUMENT

### I. THE WILLFUL MISCONDUCT REGULATION VIOLATES § 504 OF THE REHABILITATION ACT

Nine federal judges have considered whether the willful misconduct regulation violates § 504 of the Rehabilitation Act. Seven of these judges have ruled that the willful misconduct regulation cannot stand.<sup>4</sup> Only the D.C. Circuit majority in *McKelvey* has disagreed.

The discussion below will demonstrate that the willful misconduct regulation manifestly violates § 504, and that the Rehabilitation Act analysis of the D.C. Circuit majority in *McKelvey* was flawed. Moreover, the recent decision of this Court in *School Board of Nassau County v. Arline*, 107 S. Ct. 1123 (1987), requires the reversal of the D.C. Circuit’s decision.

#### A. The Willful Misconduct Regulation Clearly Violates § 504 Of The Rehabilitation Act

In determining whether § 504 has been violated, a court must determine (1) whether the plaintiff is an “individual with handicaps” under the Act; (2) whether he is “otherwise qualified” for the benefits from which he has been excluded; (3) whether he has been excluded “solely” because of his handicap; and (4) whether the program from which he has been

<sup>4</sup> See *McKelvey v. Walters*, 596 F. Supp. 1317 (D.D.C. 1984), *rev’d sub nom. McKelvey v. Turnage*, 792 F.2d 194, 203 (D.C. Cir. 1987) (Ginsburg, J., dissenting) (*McKelvey* Cert. Pet. 1a-46a); *Traynor v. Walters*, 606 F. Supp. 391 (S.D.N.Y. 1985), *rev’d on other grounds*, 791 F.2d 226 (2d Cir. 1986) (*Traynor* Cert. Pet. 1a-82a); *Tinch v. Walters*, 573 F. Supp. 346 (E.D. Tenn. 1983), *aff’d*, 765 F.2d 599 (6th Cir. 1985).



excluded is subject to § 504.<sup>5</sup> See *McKelvey v. Turnage*, 792 F.2d at 204 (*McKelvey* Cert. Pet. 17a-18a); see also *School Board of Nassau County v. Arline*, 107 S. Ct. 1123, 1127, 1130-31 (1987) (examining meaning of "handicapped individual" and "otherwise qualified"). Applying this analysis, Judge Parker in *McKelvey* and Judge Cooper in *Traynor* correctly concluded that the willful misconduct regulation violates § 504 of the Rehabilitation Act. *Traynor*, 606 F. Supp. at 398-400 (*Traynor* Cert. Pet. 66a-79a); *McKelvey*, 596 F. Supp. at 1323-24 (*McKelvey* Cert. Pet. 43a-44a).

There is no dispute that alcoholism is a handicap under § 504. This is confirmed by the 1978 amendments to the Rehabilitation Act, which added a provision now codified at § 7(8)(B) of the Act, 29 U.S.C. § 706(8)(B), removing alcoholics from the Act's coverage for employment purposes if their condition would preclude the safe performance of a particular job. The clear import of this language is that for other purposes, such as educational benefits, Congress intended alcoholics to enjoy the protections of the Rehabilitation Act. See *School Board of Nassau County v. Arline*, *supra*, 107 S. Ct. at 1130 n.14. As a result, every judge who has considered the issue now before the Court has recognized that alcoholism is a handicap

<sup>5</sup> These elements are derived from the plain language of § 504:

No otherwise qualified individual with handicaps . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency . . . .

29 U.S.C. § 794 (1982).

under § 504. See *Traynor v. Walters*, 606 F. Supp. at 398-400 (*Traynor* Cert. Pet. 67a-74a); *McKelvey v. Walters*, 596 F. Supp. at 1323, *rev'd on other grounds sub nom. McKelvey v. Turnage*, 792 F.2d at 202 n.5, 204 (*McKelvey* Cert. Pet. 14a n.5, 18a, 43a); *Tinch v. Walters*, 573 F. Supp. 346, 348 (E.D. Tenn. 1983), *aff'd*, 765 F.2d 599, 602 (6th Cir. 1985).<sup>6</sup> The VA has never, throughout the course of this litigation, contested that petitioners are handicapped individuals under the Act.

Nor can it be disputed that petitioners are "otherwise qualified" individuals within the meaning of the Rehabilitation Act. See 606 F. Supp. at 400 (*Traynor* Cert. Pet. 74a-76a); 596 F. Supp. at 1323 (*McKelvey* Cert. Pet. 43a). As this Court has recently noted, the "basic factors to be considered in conducting [an inquiry into whether a person is otherwise qualified] are well established." *School Board of Nassau County v. Arline*, 107 S. Ct. at 1131. "An 'otherwise qualified' handicapped person is one who is able to meet all of a program's requirements in spite of his handicap." *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979). "[W]ith regard to

<sup>6</sup> The Attorney General of the United States has reviewed the legislative history of § 504 and concluded that alcoholics are handicapped individuals. 43 Op. Att'y Gen. 12 at 2 (April 12, 1977). Subsequently, the predecessor of the Department of Health and Human Services issued guidelines reflecting this conclusion, 43 Fed. Reg. 2137 (1978), and the VA adopted those guidelines by regulation. 38 C.F.R. § 18.403(j)(2)(i)(C) (1986). Several other courts have recognized that alcoholics are handicapped under § 504. See, e.g., *Simpson v. Reynolds Metals Co.*, 629 F.2d 1226, 1231 n.8 (7th Cir. 1980); *Whittiker v. Board of Higher Education*, 461 F. Supp. 99, 106 n.7 (E.D. N.Y. 1978); *Davis v. Bucher*, 451 F. Supp. 791, 796-97 n.4 (E.D. Pa. 1978).

educational benefits, the term 'otherwise qualified' denotes one who 'meets the academic and technical [i.e., non-academic] standards requisite to admission or participation' with respect to educational programs."<sup>7</sup> *Traynor*, 606 F. Supp. at 400 and n.5 (*Traynor* Cert. Pet. 75a-76a and n.5) (citing original HEW regulations coordinating federal agency enforcement of § 504 and 38 C.F.R. § 18.403(k) (1986) (VA regulations implementing § 504)). Here, the VA has not disputed that Mr. McKelvey and Mr. Traynor were able to pursue a course of study at the time they applied for extensions of their delimiting dates.

Both district courts correctly concluded that the willful misconduct regulation discriminated against petitioners solely on the basis of their handicap. 606 F. Supp. at 400 (*Traynor* Cert. Pet. 76a-77a); 596 F. Supp. at 1323 (*McKelvey* Cert. Pet. 43a). The Chairman of the Board of Veterans Appeals at Mr. McKelvey's hearing had stated: "As far as we are concerned at the Board of Veterans Appeals, we don't have discretion to say that primary alcoholism is a disease." J.A. 83. Judge Parker noted that by precluding the presentation of evidence "causally related to his handicap," the Board of Veterans Appeals had denied Mr. McKelvey any opportunity to overcome

<sup>7</sup> In *Southeastern Community College v. Davis*, *supra*, the Court noted that regulations promulgated by the Department of Health, Education and Welfare to interpret § 504 state that a "[q]ualified handicapped person" is, "[w]ith respect to secondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the [school's] education program or activity." 442 U.S. at 406 (quoting 45 C.F.R. § 84.3(k)(3) (1978) (now administered by the Department of Health and Human Services)).

the presumption of willful misconduct. 596 F. Supp. at 1323 (*McKelvey* Cert. Pet. 43a). Judge Parker noted that other individuals, in contrast to alcoholics, are afforded an opportunity to demonstrate that they qualify for a delimiting date extension. *Id.*

Finally, there can be no question that the program from which petitioners were excluded is subject to § 504. Section 504 explicitly states that it covers "any program or activity receiving federal financial assistance or under any program or activity conducted by any executive agency." 29 U.S.C. § 794 (1982). The VA has not disputed that the Rehabilitation Act applies to the VA's educational benefits program. *Traynor*, 606 F. Supp. at 400 (*Traynor* Cert. Pet. 77a-78a).

The reasoning of both district courts and the five other judges who reached the same conclusion makes it clear beyond dispute that the willful misconduct regulation violates § 504 of the Rehabilitation Act. The D.C. Circuit majority in *McKelvey* reached a different result, and the next section will demonstrate that its reasoning was flawed and inconsistent with the decisions of this Court, and therefore should be reversed.

#### **B. The Analysis Of The D.C. Circuit Was Incorrect, And Would Deprive All Alcoholics Of The Protections Of The Rehabilitation Act.**

The decision of the D.C. Circuit majority in *McKelvey* rests on an improper analysis which negates the protections provided alcoholics under § 504 of the Rehabilitation Act of 1973. The majority concluded that the willful misconduct regulation simply categorizes a class of handicapped individuals on the basis of their conduct, and that discrimination on the basis



of conduct is permissible. 792 F.2d at 202 (*McKelvey* Cert. Pet. 14a). In reaching this conclusion, the majority noted that most medical experts recognize alcoholism to be a disease; a few do not. 792 F.2d at 200-01 (*McKelvey* Cert. Pet. 11a). See J.A. 34, 39-41 (Affidavit of Anne Geller); J.A. 56, 61-63 (Affidavit of Sheldon Zimberg). The majority observed that this absence of unanimity showed that the "agency's position [that alcoholism is willful misconduct] has the necessary minimal support" to make it reasonable, but also concluded that medical judgment was unnecessary, because the "application of general societal perceptions regarding personal responsibility" supports the willful misconduct regulation. 792 F.2d at 201 (*McKelvey* Cert. Pet. 11a-12a).<sup>8</sup> In the majority's view, such "general societal perceptions" make the "agency's conclusion . . . a reasonable one" that is "within the bounds of reasonable interpretation of the statute [permitting delimiting date extensions]."<sup>9</sup> The majority therefore concluded that the VA's discrimination was based on conduct, not a handicap, and so was permissible.

The majority's conclusion is in error, for the "conduct" relied upon by the majority, presumably drinking, cannot be meaningfully distinguished from the handicap of alcoholism. As Judge Ginsburg noted in her dissent, the majority's view would preclude any challenge to discrimination based on alcoholism, because such discrimination could always be "justified"

<sup>8</sup> This Court's decision in *Arline* establishes that such "perceptions," if they in fact exist, are not a legally-permissible basis for discrimination against the handicapped. See pp. 28-30 *infra*.

<sup>9</sup> 38 U.S.C. § 1662(a)(1) (1982), quoted at pp. 4-5 *supra*.

as based on conduct. 792 F.2d at 225 (*McKelvey* Cert. Pet. 21a). Yet Congress, the Attorney General, and numerous courts have determined that alcoholism is a handicap protected from discrimination by § 504 of the Rehabilitation Act.<sup>10</sup> By focusing on the physical act of taking a drink, the majority would allow the VA to ignore the causative disabling condition, alcoholism. The majority thus completely undermines the statutory protections afforded alcoholics by permitting the VA by regulation to classify alcoholism as conduct.<sup>11</sup> Section 504 prohibits limitation of eligibility for federal programs because of an individual's handicap, but through the willful misconduct regula-

<sup>10</sup> See pp. 20-21 *supra*.

<sup>11</sup> The willful misconduct regulation conflicts not only with the Rehabilitation Act, but also with other VA regulations. For example, the VA's regulations implementing the Rehabilitation Act for organizations receiving VA assistance define alcoholism as a handicap, 38 C.F.R. § 18.403(j)(2)(i)(C) (1986), and prohibit recipients of VA assistance from denying "a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service that is equal to that afforded others." 38 C.F.R. § 18.404(b)(1)(i) (1986).

Aside from this obvious inconsistency, the willful misconduct regulation does not even comport with the VA's more general regulations defining willful misconduct. Thus, VA regulations define "willful misconduct" as "an act involving conscious wrongdoing or known prohibited action," which "involves deliberate or intentional wrongdoing with knowledge of or wanton and reckless disregard of its probable consequences." 38 C.F.R. § 3.1(n) (1986). See pp. 5-6 *supra*. VA regulations specifically recognize that the willful misconduct regulation is inconsistent with the more general definition of willful misconduct. 38 C.F.R. § 3.301(c) (1986) (the more general definition is "modified" by the willful misconduct regulation).

tion, the VA achieves just such a result. The regulation accordingly cannot stand.<sup>12</sup>

The D.C. Circuit attempted to justify the willful misconduct regulation by asserting that it "affects merely the exclusion of . . . a specific class of handicapped persons from a program limited by federal statute . . . to a different class of handicapped persons" because it applies not to the educational benefits program in its entirety, but only to the educational benefits program after ten years has elapsed.<sup>13</sup> 792 F.2d at 201 n.3 (*McKelvey* Cert. Pet. 12a-13a n.3). In response to this argument, Judge Ginsburg observed that:

the notion that the educational benefits program somehow becomes a new and different program after ten years defies common sense and common use of the term 'program.' Moreover, like the majority's argument that discrimination against alcoholics is appropriately characterized as discrimination on the basis of conduct, the majority's inclination

<sup>12</sup> By invalidating the willful misconduct regulation, the Court would leave untouched the statutory provision permitting delimiting date extensions. In *Traynor*, Judge Cooper noted that "there is no conflict between the two statutes, i.e., the willful misconduct statute, 38 U.S.C. § 1662(a)(1), and § 504 of the Rehabilitation Act, 29 U.S.C. § 794." 606 F. Supp. at 401 (*Traynor* Cert. Pet. 80a).

<sup>13</sup> This exclusion is achieved not by federal statute or executive order, but impermissibly by regulation. See 28 C.F.R. § 41.51(c) (1986) ("The exclusion of a specific class of handicapped persons from a program limited by federal statute or executive order to a different class of handicapped persons is not prohibited by [the Rehabilitation Act])."

narrowly to define "program" ultimately will enfeeble the concept discrimination. If the VA may explain every act of discrimination against alcoholics in favor of other handicapped persons as simply the exclusion of alcoholics from a narrowly-defined program, discrimination against alcoholics can never occur in any program for the handicapped.

792 F.2d at 209 (*McKelvey* Cert. Pet. 28a).

Judge Ginsburg's analysis demonstrates a major flaw in the opinion of the majority below: its reasoning is potentially limitless. Any agency could seek to define programs in such a way that alcoholism in a specific context could be called conduct, thereby permitting the agency to discriminate on the basis of alcoholism.<sup>14</sup> While the majority below would prefer

<sup>14</sup> For example, in *Davis v. Bucher*, 451 F. Supp. 791 (E.D. Pa. 1978), the court invalidated under § 504 regulations that enabled the city of Philadelphia to refuse to hire recovered alcoholics or drug abusers for city jobs, including jobs supported by the Comprehensive Employment and Training Act (CETA), 29 U.S.C. § 841 *et seq.* (1982) (repealed 1982). But the decision below would permit a program sponsor to adopt regulations calling alcoholism "conduct," and thus discriminate against alcoholics on that basis.

The problem is not insignificant. There are millions of alcoholics in the United States today. A report by the National Research Council estimated that in the years 1971-1976, 1.2% of the adult population, nearly 3 million people, consumed more than 5 ounces of alcohol daily. National Research Council, *Alcohol and Public Policy: Beyond the Shadow of Prohibition*, p. 28, National Academy Press (1981). See J.A. 56, 63 ¶ 10 (Affidavit of Sheldon Zimberg). The protections afforded alcoholics by the Rehabilitation Act have a positive impact on the lives of many people, and should not be destroyed by the strange judicial construction of the majority below.



to call alcoholism conduct, Congress has concluded that alcoholism is a handicap under the Rehabilitation Act. The regulation upheld by the decision below effectively nullifies the decision of Congress, and therefore cannot stand.

**C. The D.C. Circuit's Decision Conflicts With This Court's Decision in *School Board of Nassau County v. Arline***

The decision of the D.C. Circuit majority in *McKelvey* conflicts with the decision of this Court in *School Board of Nassau County v. Arline*, 107 S. Ct. 1123 (1987). In *Arline*, the Court held that persons with contagious diseases were handicapped within the meaning of the Rehabilitation Act, and remanded the case to the district court for an inquiry into whether the petitioner was "otherwise qualified" for the position she sought. The Court noted that the "basic purpose of § 504 . . . is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others." *Id.* at 1129.

Here, the willful misconduct regulation is supported only by prejudice and ignorance. As the brief *amicus curiae* of the American Medical Association and American Psychiatric Association demonstrates, there is widespread agreement in the medical community that alcoholism is a medical condition requiring treatment, not condemnation. Such was not always the case, and particularly so when the VA first announced in 1931 that alcoholism would be defined as willful misconduct. J.A. 133.<sup>15</sup> Since that time, when Pro-

<sup>15</sup> The willful misconduct regulation does not explicitly state that "alcoholism is willful misconduct," though the VA has consistently interpreted it in that fashion. See J.A. 112-13. Thus,

hibition was the law of the land, the VA policy has been maintained with only slight modifications. J.A. 138.<sup>16</sup>

The sweeping classification of alcoholism as willful misconduct may have reflected the views of an earlier era, but advancements in medical understanding of alcoholism have shown that view to be wrong. Yet it

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the 1931 Administrator's decision that led to the current regulation states:

The main principle involved is that the simple drinking of any alcoholic beverage, whether jamaica ginger, whisky or other liquor, is not in and of itself willful misconduct. However, in the event other circumstances exist in a given case, such as deliberate drinking where the drink was known to be poisonous, or under conditions which would raise a presumption to that effect, the element of willful misconduct immediately assumes proportions. Further, if in the drinking of any beverage for the purpose of enjoying its intoxicating effects, excessive indulgence leads to disability, willful misconduct would undoubtedly inhere in the act.

J.A. 135-136. This language could reasonably be read to define as willful misconduct a disability resulting from a car wreck during a night out "drinking with the boys," but the concept that alcoholics drink "for the purpose of enjoying its intoxicating effects" can endure only because of a smug, prejudiced attitude of those without the problem toward those who suffer from alcoholism.

<sup>16</sup> One modification is the distinction between primary and secondary alcoholism. Primary alcoholism is alcoholism not caused by an underlying psychiatric condition, while secondary alcoholism stems from a psychiatric condition. While these terms may have some medical significance, as used by the VA they primarily distinguish alcoholism which will be treated conclusively as willful misconduct (primary alcoholism) from that which will not (secondary alcoholism). See *McKelvey*, 792 F.2d at 202 (*McKelvey* Cert. Pet. 13a-14a).

is just that view, which is supported by what the majority characterizes as "general societal perceptions regarding personal responsibility," that the majority cites as adequate support for the VA's willful misconduct regulation. See pp. 23-24 *supra*. As the Court recognized in *Arline*, Congress' passage of the Rehabilitation Act, an enlightened measure intended to ensure that handicapped citizens receive opportunities available to others, repudiated such prejudiced attitudes as the basis for discrimination in public programs. 107 S.Ct at 1129.

*Arline* also undermines the D.C. Circuit majority's conclusion that the discrimination against petitioners was based on conduct, rather than their handicap, and was therefore permissible. In *Arline*, the Court refused to distinguish between the contagious effects of a disease and the disease's physical effects on its victims. 107 S.Ct. at 1128. Yet here the VA makes an analogous distinction between the physical activity that leads to intoxication, and the underlying condition of alcoholism which caused petitioners to drink. *Arline* indicates that such a distinction is not meaningful and cannot justify discrimination against handicapped individuals.

*Arline* confirms that the coverage of the Rehabilitation Act is broad, and that its protection extends to all persons "otherwise qualified" for the benefits they seek. 107 S. Ct. at 1130-32. Here, both district judges found that the petitioners were "otherwise qualified." Therefore, the only impediment that prevents them from obtaining benefits on a nondiscriminatory basis is the VA's willful misconduct regulation. *Arline* indicates that this regulation cannot stand.

## II. SECTION 211(a) DOES NOT PRECLUDE THE FEDERAL COURTS FROM DETERMINING WHETHER THE VA'S WILLFUL MISCONDUCT REGULATION VIOLATES § 504 OF THE REHABILITATION ACT.

### A. Since There Was No "Decision Of The Administrator" On The Question Of Law Presented In These Cases, § 211(a) Does Not Preclude Judicial Review

Section 211(a) of the Veterans' Benefits Law provides in pertinent part:

the *decisions* of the Administrator on any question of law or fact *under* any law administered by the Veterans' Administration providing benefits for veterans . . . shall be final and conclusive and no . . . court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

38 U.S.C. § 211(a) (1982) (emphasis added). Section 211(a) does not bar judicial review of all acts or failures to act by the VA. Rather, by its plain language, § 211 (a) applies only to "*decisions* of the Administrator."<sup>17</sup> Thus, at an absolute minimum, a "decision" on the question the courts are asked to review must have been made by the Administrator. The VA has agreed with this fundamental point.<sup>18</sup>

<sup>17</sup> "Decisions of the Administrator" include decisions of the Board of Veterans' Appeals. *Traynor*, 791 F.2d at 233 (Kearse, J., dissenting) (citing 38 U.S.C. §§ 4004(a) and (b) (1982)) (*Traynor* Cert. Pet. 36a).

<sup>18</sup> The VA told the D.C. Circuit that "the language of section 211(a) does require that there be a decision at *some* level of the agency on the question of law or fact as to which preclusion of



In Mr. Traynor's case, the VA expressly declined to decide whether the willful misconduct regulation violates the Rehabilitation Act. The Board of Veterans' Appeals stated explicitly that the VA was not the proper forum for entertaining either constitutional or federal statutory challenges to the regulation: "[y]ou're asking us . . . to judge the regulations, to act as a court . . . . [W]e're incompetent in that jurisdiction." 791 F.2d at 233 (*Traynor* Cert. Pet. 35a-36a). In its final decision upon reconsideration, the Board indicated that it considered such challenges "beyond [its] power to decide." (*Traynor* Cert. Pet. 116a).<sup>19</sup>

In Mr. McKelvey's case, the VA initially disclaimed authority to decide whether the willful misconduct regulation violated the Rehabilitation Act. The VA stated in its brief to the D.C. Circuit:

We are not pursuing the question of jurisdiction on this appeal, because we do not believe that 38 U.S.C. § 211(a) can be applied to the claim under the Rehabilitation Act . . . . We do not read 38 U.S.C. § 211(a) to preclude judicial review of a point that the Veterans Administration never considered

review is sought." Supplemental Brief for Appellants at 3, *McKelvey v. Turnage* (R. 12/20/85).

<sup>19</sup> In light of these repeated disclaimers, the Second Circuit majority obviously erred in stating that the VA "has never disclaimed its authority to determine whether its own regulations comply with federal statutes" and assuming that the Board of Veterans' Appeals had in fact applied the "regulation . . . in light of the Rehabilitation Act." 791 F.2d at 229 (*Traynor* Cert. Pet. 13a, 15a ). See *id.* at 233 (Kearse, J., dissenting) (*Traynor* Cert. Pet. 34a-35a).

and, under existing regulations, probably had no authority to consider.

Brief for Appellant at 9-10 n.1 (R. 3/20/85), quoted in part at 792 F.2d 198 (*McKelvey* Cert. Pet. 7a).<sup>20</sup>

Despite the fact that the VA explicitly declined to decide the Rehabilitation Act issue in either case, both the majority in *Traynor*<sup>21</sup> and Judge Scalia in dissent in *McKelvey* concluded that because both petitioners were denied benefits, a "decision" had been reached and, in reaching that "decision," the VA had "necessarily decided" the Rehabilitation Act issue in denying those benefits. *McKelvey*, 792 F.2d at 209-210 (Scalia, J., dissenting in part) (*McKelvey* Cert. Pet. 30a). The discussion above demonstrates that these conclusions were clearly erroneous. Because there was no "decision" concerning the validity of the willful misconduct regulation under the Rehabilitation Act, § 211(a) does not prevent the federal courts from considering petitioners' challenges to the regulation.

#### B. Section 211(a) Does Not Bar Challenges To VA Regulations Under the Rehabilitation Act

Arguments seeking to limit access to the courts to challenge agency regulations must be viewed suspiciously. This Court has long honored the "strong pre-

<sup>20</sup> The VA later submitted a letter from its General Counsel stating that the willful misconduct regulation comported with § 504. See p. 13 *supra*. However this letter is characterized, it surely was not a "decision of the Administrator" for purposes of § 211(a). The D.C. Circuit declined to recognize it as such and properly assumed jurisdiction. 792 F.2d 199 (*McKelvey* Cert. Pet. 8a). As noted above, the VA has not challenged the D.C. Circuit's assumption of jurisdiction. See p. 16 *supra*.

<sup>21</sup> See p. 9 *supra*.

sumption" "that Congress intends judicial review of administrative action." *Bowen v. Michigan Academy of Family Physicians*, 106 S.Ct. 2133, 2135 (1986). In these cases, that presumption may be overcome only if there is "persuasive reason to believe" that Congress intended to preclude review of the validity of regulations of broad application when it enacted § 211(a). *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967) (citing cases); *Bowen, supra*, 106 S.Ct. 2136. "The heavy burden of overcoming this presumption rests on those who seek to insulate their actions from such scrutiny." *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975). At a minimum, this Court demands "reliable indicators" of Congressional intent before overturning the presumption favoring judicial review:

[The question whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved.

*Block v. Community Nutrition Institute*, 467 U.S. 340, 345 (1984). An examination of each of these factors in this case supports only one conclusion: Congress did not intend to prohibit a federal court challenge to the validity of the willful misconduct regulation under § 504 of the Rehabilitation Act.

**1. The Express Language Of § 211(a) Does Not Prohibit A Challenge Under The Rehabilitation Act To A VA Regulation of Broad Application.**

Section 211(a) precludes review only of

"decisions of the Administrator . . . . under any law administered by the Veterans' Administration providing benefits to veterans . . . ."

Section 504 of the Rehabilitation Act is not "a law . . . [that] provid[es] benefits for veterans." Rather, it is a civil rights statute that gives protection to individuals with handicaps. Nor is the Rehabilitation Act a "law administered by the Veterans' Administration." The President has designated two other federal agencies—first the Department of Health, Education and Welfare, and then the Department of Justice—as the agencies responsible for setting the standards and coordinating the implementation and enforcement of § 504.<sup>22</sup> See *School Board of Nassau County v. Arline, supra*, 107 S.Ct. at 1127. Although the VA must comply with the Rehabilitation Act, just as it must comply with the Constitution, it no more "administers" the Act than it "administers" the Constitution. See *Traynor*, 791 F.2d at 232-33 (Kearse, J., dissenting) (*Traynor* Cert. Pet. 32a-33a).<sup>23</sup>

<sup>22</sup> In 1976, the President designated HEW as the agency responsible for setting government-wide standards for implementing § 504 and for coordinating its implementation. See Exec. Order No. 11,914, 3 C.F.R. 117 (1977). In 1980, that Executive Order was replaced by Exec. Order No. 12,250, 3 C.F.R. 298 (1981), which transferred the authority for coordinating and enforcing § 504 to the Department of Justice.

<sup>23</sup> The dissent in *Traynor* noted that the majority "confuses administration with compliance" in regard to the VA's responsibilities under the Rehabilitation Act. 791 F.2d at 232-33 (*Traynor* Cert. Pet. 32a-33a). That confusion would permit the VA or other agencies willfully to ignore or violate an important federal law, refuse to hear an appeal of its failure to follow the law, and then insulate that defiance by denying court access to



For these reasons, by its plain language § 211(a) does not bar judicial consideration of petitioners' challenges to the willful misconduct regulation. This is confirmed by this Court's decision in *Johnson v. Robison*, 415 U.S. 361 (1974). In *Johnson*, the Court made clear that only a narrow category of "decisions" falls within § 211(a)'s prohibition against judicial review: those "made by the Administrator in the ... application of a particular provision of the [veterans' benefits] statute to a particular set of facts." 415 U.S. at 367.<sup>24</sup>

A determination by the VA about the validity of the willful misconduct regulation would not be a "decision" within the meaning of § 211(a) because it requires a legal determination under the Rehabilitation Act, rather than under the Veterans' Benefit Law. It also does not require a decision concerning a "particular set of facts." Rather it involves a challenge to a regulation that conclusively determines the outcome of an entire class of veterans' benefit claims by prohibiting any individualized application of the Veterans' Benefits Law to the facts underlying such claims. Only an interpretation of § 211(a) that permits judicial scrutiny of VA regulations whose validity is challenged under statutes which do not pertain to

those the law was designed to protect. Such a result violates fundamental principles of fairness.

<sup>24</sup> In *Johnson*, this Court noted that its reading of § 211(a)'s scope was "supported by the administrative practice of the Veterans' Administration", in administrative appeals identical to those of the petitioners in this case, of "expressly disclaim[ing] authority to decide constitutional questions". 415 U.S. at 367-68. Similarly, the VA consistently has disclaimed authority to decide federal statutory challenges to the validity of its regulations.

veterans' benefits fairly takes into account the full text of § 211(a) and *Johnson's* interpretation of it.

## 2. "Decisions" And "Regulations" Have Separate And Distinct Meanings In § 211(a) And In The Statutory Scheme Of The Veterans' Benefits Law.

A challenge to a VA regulation is not a challenge to a "decision of the Administrator," and therefore is not barred by § 211(a). The terms "decisions" and "regulations" are not defined under the Veterans' Benefit Law, but those terms have always been used distinctively in that law and are intended to mean different things.

The predecessor of § 211(a) is found at § 5 of the Economy Act of 1933, Pub. L. No. 73-2, § 5, 48 Stat. 8 (1933). As originally enacted, § 5 provided:

All decisions rendered by the Administrator of Veterans' Affairs under the provisions of [Title I of the Economy Act], or the regulations issued pursuant thereto, shall be final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review by mandamus or otherwise any such decision.

48 Stat. 9. The Economy Act delegated to the President the authority to promulgate regulations setting veterans' pensions.<sup>25</sup> It then immunized from judicial review only those decisions of the Administrator that applied the statute *and* regulations to the unique facts

<sup>25</sup> Title I authorized the President, not the VA, to issue these regulations. Congress did not use "regulations" and "decisions" synonymously. See §§ 3, 4, 7-9, 48 Stat. 8, 9-10 (1933).

of each individual veteran's claim. See §§ 3-4 of the Economy Act, 48 Stat. 9-10 (1933); see also n.27 *infra*.

In the various versions of the preclusion-of-review provision enacted since 1933, Congress has never altered the original and distinctive meanings of the words "decisions" and "regulations." Indeed, Congress' intent to maintain its original distinction between "decisions" and "regulations" is clear from another key provision of the Veterans' Benefits Law whose precursors date back to 1933.<sup>26</sup>

Section 4004 of the Veterans' Benefits Law defines the jurisdiction of the Board of Veterans' Appeals, the body which actually makes the "decision of the Administrator" in all veterans' appeals. It provides in relevant part:

(a) All questions on claims involving benefits under the laws administered by the Veterans' Administration shall be subject to one review on appeal to the Administrator. Final decisions on such appeals shall be made by the Board.

\* \* \*

(c) The Board shall be bound in its decisions by the regulations of the Veterans' Administration, instructions of the Admin-

<sup>26</sup> Congress' retention of the same language in earlier and later versions of a statute provides strong evidence of its intent to retain the original meaning of that language. *Bell v. New Jersey*, 461 U.S. 773, 784 (1983). Similarly, words used with the same meaning in related provisions of a single statute are a useful guide to statutory construction. *Bob Jones University v. United States*, 461 U.S. 574, 587 & n.10 (1983).

istrator, and the precedent opinions of the chief law officer.

38 U.S.C. § 4004(a), (c) (1982) (emphasis supplied). Thus § 4004 distinguishes between "decisions" in individual cases and "regulations" or other rules of broad application by which the Board is bound in reaching its decisions. Only the former types of determinations constitute "decisions of the Administrator" that are immunized from review under § 211(a).

**3. The Legislative History Of § 211(a) And Its Predecessors Confirms That Congress Intended To Preclude Judicial Review Only Of Individual Benefits Determinations And Not Of Regulations**

Since Congress enacted the first version of § 211(a) in 1933, it has consistently made clear its unwavering intention to immunize from judicial review only decisions applying the veterans' benefits laws and regulations to the particular facts of each veteran's case. It is equally clear that Congress did not intend to immunize from judicial scrutiny VA regulations such as the one challenged here.

The legislative history of the first version of § 211(a), § 5 of the Economy Act of 1933, is almost non-existent. *Johnson v. Robison*, *supra*, 415 U.S. at 369. The history does, however, confirm that Congress focused on barring review of decisions about individual veterans' claims that the Administrator rendered when "acting under [the] regulations and rates" established by the President.<sup>27</sup> In the various

<sup>27</sup> 77 Cong. Rec. 254 (1933) (remarks of Sen. Harrison) ("Section 5 gives to the Administrator only such power as the Administrator now has. The only purpose of this section is that, after the President has announced the regulations [establishing



versions of the statute enacted between 1933 and 1970, when Congress last amended the preclusion section, that focus never shifted.<sup>28</sup>

pension requirements and rates] . . . , acting under those regulations and rates, whatever decision the Administrator shall make shall be final.'').

<sup>28</sup> In 1940, the Congress added a new section to the former Pension, Bonuses and Relief Act, part of which concerned veterans' pensions. § 11, 54 Stat. 1197 (1940). This amendment, which was later consolidated with § 5 of the Economy Act to become the preclusion-of-review provision for purposes of the veterans' law, was, in the words of the VA, "similar to that contained in Section 5, Public L. No. 2, Seventy-third Congress." 86 Cong. Rec. 13,490 (1940); its only purpose was to bring uniformity to the various veterans' laws. *See, e.g.*, 86 Cong. Rec. 13,490 (remarks of Mr. Rankin), 86 Cong. Rec. 13,491 (remarks of Mrs. Rogers).

In 1957, the Congress, in consolidating the veterans' benefit laws, also consolidated the former preclusion-of-review provisions in one section. § 211, Veterans' Benefit Law of 1957, 71 Stat. 83, 92 (1957). As the Court noted in *Johnson, supra*, 415 U.S. at 369 n.10, the legislative history of the amendment is not instructive. Nothing, however, indicated that Congress intended to expand the scope of the preclusion section. *See* H.R. Rep. No. 279, 85th Cong., 1st Sess. 1 (1957); S. Rep. No. 332, 85th Cong. 1st Sess. 1 (1957).

The last amendment to the veterans' preclusion-of-review clause, and the current version of § 211(a), was enacted in response to a series of cases decided by the D.C. Circuit. Those cases had limited the scope of the section to initial claims for benefits, but held that suits challenging the propriety of benefit terminations were not barred. *Tracy v. Gleason*, 379 F.2d 469 (D.C. Cir. 1967); *Thompson v. Gleason*, 317 F.2d 901 (D.C. Cir. 1962); *Wellman v. Whittier*, 259 F.2d 163 (D.C. Cir. 1958). Congress changed § 211(a) in 1970 to its present form expressly to reject the "fairly tortured construction adopted by the court of appeals in the *Wellman*, *Thompson*, and *Tracy* holdings," H.R.

In fact, Congress has reconsidered the preclusion section on a number of occasions in recent years. The record of those deliberations reveals that, in declining to expand its scope, Congress understood not only that an increasing number of federal courts of appeals had found § 211(a) not to bar review of regulations challenged on constitutional or statutory grounds, but also that the VA had represented consistently that § 211(a) does not preclude such review.<sup>29</sup> This Court has held repeatedly that Congressional awareness of the consistent administrative practice of the agency charged with administering a statute is a significant source for understanding Congressional intent. *See, e.g., Bell v. New Jersey*, 461 U.S. 773, 787 (1983); *Andrus v. Shell Oil Company*, 446 U.S. 657, 666 n.8, 667-672 (1980).

Rep. No. 1166, 91st Cong., 2d Sess. 11 (1970), reprinted in [1970] U.S. Code Cong. & Ad. News p. 3723, 3730-31; and to "preserve [§ 211(a)'s] two [original and] primary purposes," *Johnson, supra*, 415 U.S. at 371. *See* pp. 45-46 *infra*. The authors and sponsors of the 1970 amendment explained its purpose solely in terms of restoring uniformity to the "decisions in individual cases," 116 Cong. Rec. 26,489-90 (daily ed., July 30, 1970) (remarks of Mr. Teague, Chairman of the House Comm. on Veterans' Affairs). *See also* 116 Cong. Rec. 19,733-35 (daily ed., June 16, 1970) (remarks of Mr. Teague).

<sup>29</sup> *See, e.g., Veterans' Administration Adjudication Procedure and Judicial Review Act: Hearings on S.349 Before the Senate Committee on Veterans' Affairs*, 97 Cong., 1st Sess. 130, 131 (1981) (Statement of VA Acting General Counsel Robert Coy); *Judicial Review of Veterans' Claims: Hearings Before the Subcommittee on Special Investigations of the House Committee on Veterans' Affairs*, 96th Cong., 2d Sess. 84 (1980) (Statement of VA General Counsel Guy McMichael); *see also* pp. 42-45 *infra*.

Congress was advised as early as 1952 of the VA's position that the precursor of § 211(a) was designed only to bar review of individual fact-bound claims.

In the adjudication of compensation and pension claims a wide variety of medical, legal, and other technical questions constantly arise which require the study of expert examiners of considerable training and experience, and which are not readily susceptible of judicial standardization. Among other questions to be determined in the adjudication of such claims are those involving length and character of service, origin of disabilities, complex rating schedules, a multiplicity of medical and physical phenomena for consideration intercurrently with such schedules, and the application of established norms to the peculiarities of the particular case. These matters have not been considered by the Congress or the courts appropriate for judicial determination but have been regarded as apt subjects for the purely administrative procedure.

*Hearings on H.R. 360, 478, 2442 and 6777 Before a Subcommittee of the House Committee on Veterans' Affairs, 82nd Cong., 2d Sess., 1962-63 (1952) (discussed in Johnson v. Robison, 415 U.S. 361, 371 & n.12 (1974)).*

More recently—in 1982 and again in 1984, when Congress considered legislation that ultimately resulted in the Veterans' Dioxin and Radiation Compensation Standards Act, Pub. L. No. 98-542, 98 Stat. 2725 (1984)—the VA's consistent position on the scope

of § 211(a) influenced Congress not to amend that section.<sup>30</sup> In an exchange of letters with Senator Cranston of the Senate Committee on Veterans' Affairs, Robert P. Nimmo, then VA Administrator, explained the VA's position regarding the meaning and scope of § 211(a) as follows:

I continue to believe, as I stated in a written response to your question at my confirmation hearing, that VA regulations should be, and are, reviewable in the Federal courts. This principle was further explained by the Acting General Counsel last summer, when he indicated to the Committee that "legislation, regulations, and procedures" are judicially reviewable, as are "substantive Agency actions of broad, binding application."

Section 211(a) has been properly limited by the courts so that *it does not protect every decision, policy, or action of the VA from*

<sup>30</sup> While post-enactment Congressional action or inaction must be treated cautiously in determining the intention of a previous Congress, *e.g.*, *Universities Research Ass'n v. Coutu*, 450 U.S. 754, 778 (1981), post-enactment statements may indicate how key members of Congress interpret particular provisions of a statute. *See e.g.*, *Grove City College v. Bell*, 465 U.S. 555 (1984); *Bell v. New Jersey*, 461 U.S. 773, 784-87 (1983); *Andrus v. Shell Oil Co.*, 446 U.S. 657, 668-72 (1980). In addition, this Court has recognized the significance of evidence that Congress has reconsidered statutory provisions, but chosen not to alter them because it was aware of, agreed with, and relied upon prevailing interpretations of those laws by courts or the federal agencies charged with their administration. *See, e.g.*, *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 782 n.15 (1985); *Bob Jones University v. United States*, 461 U.S. 574, 606-608 (1983) (Powell, concurring in part).



*judicial scrutiny.* Those Agency rules and procedures of broad and binding application which affect the *rights of a number of claimants to VA benefits are not protected by section 211(a).* The way the VA processes and decides an individual benefit claim is clearly beyond the reach of the Federal courts, however

....

Section 211(a) will not be raised by the Veterans Administration, nor by Department of Justice at our recommendation, when there is either a clear challenge to the constitutionality of a statute, regulation or procedure or an *allegation that a regulation or procedure is inconsistent with law.* This is the general policy you cite in your letter, which was enunciated by the Acting General Counsel in his written response following the hearing of July 15, 1981, on S.349.

Letter from Robert P. Nimmo to Senator Alan Cranston, March 24, 1984 (*reprinted in full* at 130 Cong. Rec. S6160 (daily ed. May 22, 1984) (emphasis supplied)).

Moreover, during the floor debate about the Veterans' Dioxin Act, several Senators on the Veterans' Affairs Committee stated that it was understood among the Conference Committee negotiators that § 211(a) permitted judicial review of regulations promulgated by the Administrator. *See, e.g.,* 130 Cong. Rec. S13,591, S13,598 (daily ed. Oct. 4, 1984) (remarks of Sen. Cranston); *id.* at S13,608 (remarks of

Sen. Spector); *id.* at S13,610 (remarks of Sen. Mitchell).

Even more recently, the VA reaffirmed that position:

"[T]he VA regards its regulations and substantive agency actions of broad application to be subject to judicial review. Accordingly, there are many instances in which § 211(a) of Title 38 United States Code, does not preclude judicial review, at least with respect to these questions of law."

*H.R. 585 and Other Bills Relating to Judicial Review of Veterans' Claims: Hearings Before the Committee on Veterans' Affairs, House of Representatives, 99th Cong., 2d Sess., Vol. II, 328 (1986).*

Thus, the legislative history of § 211(a) and its predecessors and the position of the VA itself clearly and consistently support the conclusion that § 211(a) does not prohibit judicial scrutiny of the VA's willful misconduct regulations.

**C. Permitting Review of Challenges To VA Regulations Will Not Impose Burdensome And Technical Litigation Upon The Courts, And Will Further The Goals Of The Rehabilitation Act.**

**1. Allowing Review Will Not Thwart The Purposes Of § 211(a).**

In *Johnson v. Robison*, this Court concluded that Congress intended § 211(a) to serve two primary purposes:

(1) to insure that veterans' benefits claims will not burden the courts and the Veterans' Administration with expensive and time-consuming litigation, and

(2) to insure that the technical and complex determinations and applications of Veterans' Administration policy connected with veterans' benefits decisions will be adequately and uniformly made.

415 U.S. at 369, 370 (footnotes omitted). Permitting judicial review of a challenge under the Rehabilitation Act to the willful misconduct regulation is consistent with these objectives.

Four circuit courts have concluded that § 211(a) does not bar review of statutory and constitutional challenges to VA regulations. Those courts uniformly have found that the policies underlying § 211(a) would not be impaired by permitting review,<sup>31</sup> and the experience in each circuit has borne this out. Few lawsuits challenging VA regulations have been filed,<sup>32</sup> and

<sup>31</sup> See *Evergreen State College v. Cleland*, 621 F.2d 1002 (9th Cir. 1980); *University of Maryland v. Cleland*, 621 F.2d 98 (4th Cir. 1980); *Merged Area X (Education) v. Cleland*, 604 F.2d 1075 (8th Cir. 1979); and *Wayne State University v. Cleland*, 580 F.2d 627 (6th Cir. 1978). The Second Circuit attempted to distinguish these cases on the ground that they were brought by "educational institutions interested in the overall administration of the VA educational benefits program," rather than individual veterans. 791 F.2d 230 (*Traynor* Cert. Pet. 18a-19a). This distinction is factually incorrect, for individual veterans were among the plaintiffs in *Wayne State*, 590 F.2d at 628 n.1, and in *Merged Area X (Education)*, 604 F.2d at 1077. It also ignores the fact that the ultimate beneficiaries of suits brought by educational institutions are individual veterans, and that the invalidation of the willful misconduct regulation will benefit not only petitioners but other veterans as well.

<sup>32</sup> By petitioners' count, two such suits have been filed in the Fourth Circuit, see *American Federation of Government Employees, AFL-CIO v. Nimmo*, 711 F.2d 28 (4th Cir. 1983) and

an examination of those suits indicates that they have not involved the courts in "technical and complex determinations and applications of Veterans' Administration policy." Rather, these suits have raised purely legal issues which the courts, not the VA, are uniquely competent and qualified to decide.<sup>33</sup>

**2. Allowing Review Will Further The Goals Of The Rehabilitation Act And Will Ensure That All Persons Enjoy The Protection Of The Laws.**

Allowing judicial review of the VA regulation challenged in this case will enhance two vital national policies. The first of these is the protection of the handicapped, including those suffering from alcoholism. The United States government formally has recognized that alcoholism is an illness to be treated rather than conduct to be condemned. This national policy was first enunciated by Congress in the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970, Pub. L. No. 91-616, 84 Stat. 1848 (1970), 42 U.S.C. § 4541 (1982) ("Comprehensive Alcoholism Act"). The policy was reaffirmed by the passage of the Rehabilitation

*Plato v. Roudebush*, 397 F.Supp. 1295 (D. Md. 1975); one in the Sixth Circuit, see *Tinch v. Walters*, 573 F. Supp. 346 (E.D. Tenn. 1983), *aff'd*, 765 F.2d 599 (6th Cir. 1985); two in the Seventh Circuit, see *Taylor v. United States*, 385 F. Supp. 1035 (N.D. Ill. 1974), *vacated and remanded*, 528 F.2d 60 (7th Cir. 1976), and *Arnolds v. Veterans' Administration*, 507 F. Supp. 128 (N.D. Ill. 1981); and two in the Eighth Circuit, see *Burns v. Nimmo*, 545 F. Supp. 544 (N.D. Iowa 1982) and *Waterman v. Roudebush*, No. 4-77-Civ. 70 (D.Minn. 1979).

<sup>33</sup> Petitioners' cases are good examples of such suits. They have involved purely legal questions suitable for prompt judicial resolution, and were both decided on motions for summary judgment.



Act, and its nondiscrimination provision codified at § 504. Yet, as described above, *see* pp. 19-30 *supra*, the willful misconduct regulation tramples upon the rights of alcoholics, as handicapped citizens, to enjoy the benefits available to others. If the willful misconduct regulation is immune from court review, the VA will continue to be free to ignore the Congressional commands set forth in the nondiscrimination provision of the Rehabilitation Act.

The second important national policy that would be advanced by permitting review here is "[t]he very essence of civil liberty . . . the right of every individual to claim the protection of the laws." *Bowen v. Michigan Academy of Family Physicians*, *supra*, 106 S. Ct. at 2136 (quoting Chief Justice Marshall in *Marbury v. Madison*, 5 U.S. 137, 163 (1803)). This right can have no meaning unless those entitled to claim the protection of the laws are afforded a forum in which to seek remedies for their violation. *Id.*, 106 S. Ct. at 2136.

This Court has protected this interest by presuming that Congress intends to permit judicial review of administrative agency action *unless* it expresses a clear intent to the contrary. As discussed previously, since Congress has not expressed such an intent with respect to VA regulations, this presumption must prevail here.

Moreover, divesting the courts of jurisdiction would leave petitioners without any forum to hear their civil rights claims, for the Board of Veterans' Appeals has disclaimed authority to decide this issue. *See* pp. 31-33 *supra*.

Under similar circumstances, this Court repeatedly has found it appropriate to subject binding regulations

to judicial review, notwithstanding preclusion statutes similar to § 211(a), if divesting the courts of jurisdiction would leave no forum at all in which to consider and decide important questions of law. *See, e.g., Bowen*, *supra*, 106 S. Ct. at 2138; *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Brock*, 106 S. Ct. 2523, 2530 (1986) (applying "frequently upheld" principle that, when individual eligibility determinations of benefit programs are left exclusively to state judicial and administrative processes, "claims that a program is being operated in contravention of a federal statute or the Constitution can nonetheless be brought in federal court") (citations omitted); *see also Wallace v. Christensen*, 802 F.2d 1539 (9th Cir. 1986) (decision holding process under Parole Act not shielded from review despite preclusion provision). This Court has not precluded review of regulations where no other relief was available, *see, e.g. Bowen*, *supra*, 106 S. Ct. at 2140-41, and should not permit that to happen here.

## CONCLUSION

For the reasons discussed above, the Court should reverse the decisions of the Second Circuit in *Traynor* and the D.C. Circuit in *McKelvey* and invalidate the VA's willful misconduct regulation because it conflicts with § 504 of the Rehabilitation Act. Based on the findings of the district courts below, the Court should remand these cases to the respective Courts of Appeals with instructions that the courts order the VA to make petitioners' remaining educational benefits available to them.

Respectfully submitted,

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# **RESPONDENT'S BRIEF**



8 9  
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Supreme Court, U.S.  
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**In the Supreme Court of the United States**

OCTOBER TERM, 1987

EUGENE TRAYNOR, PETITIONER

v.

THOMAS K. TURNAGE, ADMINISTRATOR OF VETERANS'  
AFFAIRS AND VETERANS' ADMINISTRATION

JAMES P. MCKELVEY, PETITIONER

v.

THOMAS K. TURNAGE, ADMINISTRATOR OF VETERANS'  
AFFAIRS AND VETERANS' ADMINISTRATION

ON WRITS OF CERTIORARI TO THE  
UNITED STATES COURTS OF APPEALS  
FOR THE SECOND CIRCUIT AND THE  
DISTRICT OF COLUMBIA CIRCUIT

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### QUESTIONS PRESENTED

1. Whether 38 U.S.C. 211(a) precludes judicial review of a decision by the Veterans Administration denying a veteran's application for educational benefits and request to extend the statutory period within which the veteran may receive educational benefits.

2. Whether, if we assume that in these cases judicial review is not barred, the denial of benefits violated the Rehabilitation Act, 29 U.S.C. 794.

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## Miscellaneous:

American Psychiatric Ass'n, <i>Diagnostic and Statistical Manual of Mental Disorders</i> (3d ed. 1980) .....	34, 43
Blume, <i>Public Policy Issues, in Alcoholism and Related Problems: Issues For The American Public</i> (1984) .....	26, 43
Bohman, et al., <i>Maternal Inheritance of Alcohol Abuse: Cross-Fostering Analysis of Adopted Women</i> , 38 Arch. Gen. Psychiatry 965 (1981)....	45
<i>Categories, Careers, and Outcomes of Alcoholism</i> , The Lancet (Mar. 29, 1986) .....	27, 29
G. Chaucer, <i>The Canterbury Tales (The Pardoner's Tale)</i> in <i>Chaucer's Poetry</i> (E. Donaldson ed. 1958) .....	26
Cloninger, et al., <i>Inheritance of Alcohol Abuse: Cross-Fostering Analysis of Adopted Men</i> , 38 Arch. Gen. Psychiatry 861 (1981) .....	34, 45

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## 130 Cong. Rec. (daily ed. May 22, 1984):

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## 42 Fed. Reg. (1977):

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## 52 Fed. Reg. 25124 (1987) .....

Fingarette, *The Perils of Powell: In Search of a Factual Foundation for the "Disease Concept of Alcoholism,"* 83 Harv. L. Rev. 793 (1970) 43, 44, 45, 46M. Guttmacher, *The Role of Psychiatry in Law: The Irresistible Impulse* (1968) .....E. Jellinek, *The Disease Concept of Alcoholism* (1960) .....Kissin & Hanson, *The Bio-psycho-social Perspective in Alcoholism*, in *Alcoholism and Clinical Psychiatry* (J. Solomon ed. 1982) .....

## 43 Op. Att'y Gen. 12 (1977) .....

Peele, *The Implications and Limitations of Genetic Models of Alcoholism and Other Addictions*, 47

## J. Studies on Alcohol 63 (1986) .....

Schuckit, *Genetic Aspects of Alcoholism*, 15 Annals of Emergency Medicine 991 (1986) .....

## S. Rep. 2198, 76th Cong., 3d Sess. (1940) .....

## S. Rep. 95-468, 95th Cong., 1st Sess. (1977) .....

## S. Rep. 96-314, 96th Cong., 1st Sess. (1979) .....

## S. Rep. 98-604, 98th Cong., 2d Sess. (1984) .....

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Talbott, <i>Alcoholism and Other Drug Addictions: A Primary Disease Entity</i> , 75 J. Med. Ass'n Ga. 490 (1986) .....	47
VA Manual:	
M21-1 .....	2, 20, 30, 2a
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G. Vaillant, <i>The Natural History of Alcoholism</i> (1983) .....	34, 35, 46
West, <i>Alcoholism and Related Problems: An Overview</i> , in <i>Alcoholism and Related Problems: Issues for the American Public</i> (1984) .....	46
Wolf, <i>Alcohol and Health: The Wages of Excessive Drinking</i> , in <i>Alcoholism and Related Problems: Issues for the American Public</i> (1984) ....	44
Zimberg, <i>Office Psychotherapy of Alcoholism in Alcoholism and Clinical Psychiatry</i> (J. Solomon ed. 1982) .....	34
S. Zimberg, <i>The Clinical Management of Alcoholism</i> (1982) .....	29, 30, 34, 44, 46

## In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-622

EUGENE TRAYNOR, PETITIONER

v.

THOMAS K. TURNAGE, ADMINISTRATOR OF VETERANS'  
AFFAIRS AND VETERANS' ADMINISTRATION

No. 86-737

JAMES P. MCKELVEY, PETITIONER

v.

THOMAS K. TURNAGE, ADMINISTRATOR OF VETERANS'  
AFFAIRS AND VETERANS' ADMINISTRATION

ON WRITS OF CERTIORARI TO THE  
UNITED STATES COURTS OF APPEALS  
FOR THE SECOND CIRCUIT AND THE  
DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

## OPINIONS BELOW

The opinion of the court of appeals in No. 86-622 (Pet. App. 1a-38a) is reported at 791 F.2d 226. The opinion of the district court in No. 86-622 (Pet. App. 39a-82a) is reported at 606 F. Supp. 391. The opinion of the court of appeals in No. 86-737 (Pet. App. 1a-31a) is reported at 792 F.2d 194. The opinion of the district court in No. 86-737 (Pet. App. 32a-47a) is reported at 596 F. Supp. 1317.

(1)

## JURISDICTION

The judgment of the court of appeals in No. 86-622 was entered on May 16, 1986. A petition for rehearing was denied on July 15, 1986 (Pet. App. 86a-87a). The petition for a writ of certiorari was filed on October 14, 1986 (a Tuesday following a legal holiday), and was granted on March 9, 1987. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

The judgment of the court of appeals in No. 86-737 was entered on May 30, 1986. A petition for rehearing was denied on August 7, 1986 (Pet. App. 49a). The petition for a writ of certiorari was filed on November 5, 1986, and was granted on March 9, 1987. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of 38 U.S.C. 211(a), of Section 203 of the G.I. Bill Improvement Act of 1977, Pub. L. No. 95-202, Tit. II, 91 Stat. 1439, 38 U.S.C. (Supp. II 1978) 1662, of 38 C.F.R. 3.301(c)(2), and of Veterans Administration Manual M21-1, are set out at App., *infra*, 1a-2a.

## STATEMENT

1. Congress has, for many years, enacted legislation providing benefits to disabled veterans except where the disability resulted from the veteran's willful misconduct. See, *e.g.*, 38 U.S.C. 310, 410, 521 (disability pensions). The same exclusion from benefits also applies to the program involved in this case—educational benefits for veterans. The educational benefits statute authorizes the payment of benefits within ten years following the veteran's last discharge or release from active duty; however, the strict ten-year limit on educational benefits may be extended for those veterans who were unable to use their benefits during that period "because of a physical or mental disability which was not the result of \* \* \* [their] own willful misconduct." Pub. L. No. 95-202, Tit. II, § 203(a)(1), 91 Stat. 1439, 38 U.S.C. 1662(a)(1).

In the cases presently before the Court, petitioners are veterans who did not utilize the full educational benefits available to them during their respective ten-year periods. In each case, petitioner sought to extend his period of eligibility, contending that he was disabled during part of the delimiting period because of alcoholism. The Veterans Administration (VA) denied extensions to both petitioners in accordance with its longstanding interpretation of the circumstances in which alcoholism would be regarded as "willful misconduct" within the meaning of the benefits statute.

The applicable VA regulation (38 C.F.R. 3.301(c)(2)) had been promulgated in 1972, prior to the enactment of the provision for extending the time limit within which disabled veterans could receive educational benefits. When the regulation was issued it was addressed primarily to alcoholism as a basis for disability pensions and incorporated principles set forth in a 1964 VA administrative decision. 37 Fed. Reg. 20335-20336 (1972) (proposed regulation); 37 Fed. Reg. 24662 (1972) (final regulation).<sup>1</sup> The 1964 administrative decision, drawing on VA rulings dating back to 1931, distinguished between "primary" alcoholism and alcoholism that is "secondary to and a manifestation of an acquired psychiatric disorder." Administrator's Decision No. 988 (Aug. 13, 1964) (J.A. 138, 142-143). Such "secondary" alcoholism is not considered willful misconduct (*id.* at 143). Nor does the 1964 VA decision regard as the product of willful misconduct any organic disorder caused by chronic alcoholism, such as cirrhosis of the liver, gastric ulcer, peripheral neuropathy, vitamin deficiency, or chronic brain syndrome (*id.* at 144). "While it is proper to hold a person responsible for the direct and immediate results

<sup>1</sup> A companion provision (38 C.F.R. 3.301(c)(3)) establishes similar standards for determining when drug usage constitutes "willful misconduct" rendering the recipient ineligible for a disability pension or an educational benefits extension.



of indulgence in alcohol, it cannot be reasonably said that he expects and *wills* the disease and disabilities which sometimes appear as secondary effects" (*ibid.* (emphasis in original)).

Consistently with this policy, the VA grants extensions of the delimiting period to disabled veterans whose alcoholism is the secondary product of a psychiatric disorder or whose alcoholism has caused an organic disorder. The agency's policy does not permit an extension to be granted to an alcoholic veteran who cannot show the existence of either the specified underlying or derivative disorder. It also does not grant an extension on account of a disability suffered, for example, in an automobile accident by a veteran who was driving under the influence of alcohol. Should the VA deny a veteran's request to extend his delimiting period for receiving educational assistance benefits, that veteran would still remain eligible to receive a VA educational loan covering the full-time studies the veteran was pursuing when his delimiting period ended (38 U.S.C. 1662(a)(2)(A)).

2. No. 86-622: Eugene Traynor was honorably discharged from the Army on August 27, 1969, after serving on active duty for 18 months. He entered college in 1977 and received veterans' education assistance benefits until those benefits were terminated when his ten-year period of eligibility expired on August 27, 1979. Traynor, who had used nine and one-half of the 24 months of benefits available to him (based on length of service), sought to have his period of eligibility for benefits extended. He contended that he had been unable to utilize his full benefits within ten years of discharge because he had suffered from alcoholism for 15 years ending in 1974. Pet. App. 3a-4a.

During the administrative proceedings, Traynor asserted that the VA regulation stating the circumstances in which alcoholism constitutes willful misconduct is violative of the Rehabilitation Act, 29 U.S.C. 794. The Board of Veterans Appeals did not expressly adjudicate that statutory claim, noting that it was bound by VA

regulations. The Board did, however, explain that the consistent VA policy (Pet. App. 117a) is:

that alcoholism can and should be considered an illness for purposes of medical treatment and rehabilitation, and that the simple drinking of any alcoholic beverage is not in and of itself willful misconduct. On the other hand, if in the consumption of alcohol for the purpose of enjoying its intoxicating effect excessive indulgence leads to disability, such disability will be considered the result of the person's willful misconduct.

Noting that "Congress has never enjoyed the luxury of having unlimited funds with which to provide for gratuitous Veterans Administration benefits," the Board explained that historically benefits have not been granted for a disability that results from willful misconduct (*id.* at 117a-118a). The Board observed that the veterans benefits programs have regarded alcoholism as potentially disqualifying misconduct ever since the earliest veterans regulations promulgated by President Roosevelt. The Board added that (*id.* at 118a-119a):

Since then, a distinction has been maintained between fortuitously incurred disease or disability, for which gratuitous Veterans Administration benefits may be afforded, and other nonfortuitous disabilities incurred at the hands of the claimant himself/herself. Alcoholism is not singled out for special consideration; other disabilities may be considered the result of willful misconduct, under appropriate circumstances. Whether the illness i[n] question is alcoholism or some other disability, the Veterans Administration evaluates the circumstances of each individual in determining willful misconduct.

Finding no error in its prior determination that the facts of this case warranted a finding of willful misconduct, the Board denied Traynor's request for benefits beyond his delimiting date.

Traynor then filed suit in the United States District Court for the Southern District of New York. He alleged



that the VA decision violated the Rehabilitation Act, the Due Process Clause and the Equal Protection component of the Fifth Amendment. The district court held that "[s]ince [the complaint] requires us to examine constitutional and statutory questions and not merely issues of VA policy, we conclude, in accordance with the Supreme Court's holding in *Johnson v. Robison*, 415 U.S. 361 (1974)], that we are not precluded from exercising our jurisdiction in this matter by 38 U.S.C. § 211(a)." Pet. App. 58a-59a. On the merits, the district court rejected the constitutional challenge (*id.* at 59a-64a), but held that the VA decision violated the Rehabilitation Act. The court held that alcoholism is a handicap covered by the Rehabilitation Act (*id.* at 69a-72a), and that the denial of benefits constitutes discrimination against alcoholics forbidden by that Act.

The court of appeals for the Second Circuit reversed. The panel majority held that 38 U.S.C. 211(a) bars judicial review of the Rehabilitation Act issue. The court stated (Pet. App. 16a-17a) that although "many veterans have in the service of our country suffered injuries that qualify them as 'handicapped individual[s]' for purposes of Section 504 of the [Rehabilitation Act] \* \* \*, Congress did not delineate any exception to section 211(a) for 'handicapped' veterans when it passed section 504." Thus, the court explained, there is no basis for concluding that Congress intended "to grant to 'handicapped' veterans the judicial review traditionally denied all other veterans." Pet. App. 17a.

Judge Kearse dissented on the jurisdictional issue.<sup>2</sup> She suggested that Section 211(a) does not bar judicial review because the Rehabilitation Act neither provides benefits to veterans nor is it administered by the VA (Pet. App. 32a). In addition, Judge Kearse deemed Section 211(a) to be inapplicable because there was no decision of the Administrator on the Rehabilitation Act issue, the Board of Veterans Appeals having "refused, on the

<sup>2</sup> She expressed no view on the merits (Pet. App. 38a).

ground of lack of authority, to decide whether the challenged regulations violated the Rehabilitation Act" (Pet. App. 36a).

3. No. 86-737: Petitioner McKelvey was honorably discharged from the Army in September 1966 after serving on active duty for three years (Pet. App. 4a). From 1966 to 1971 he was employed as a salesman for a surgical supply corporation (C.A. App. 65-66, 89-90). During the next four years he was hospitalized at various times for alcoholism and associated conditions. He received educational benefits from the VA briefly in 1973 and 1974 (C.A. App. 76-77). When he applied for additional benefits in 1978, more than 10 years after his discharge, the Board of Veterans Appeals denied his request to extend his period of eligibility and rejected his application for benefits. The Board found, after a hearing, that there was "no evidence that an acquired psychiatric disease preceded [McKelvey's] alcoholism" (Pet. App. 5a (citation omitted)).

McKelvey filed suit in the United States District Court for the District of Columbia. He claimed that the denial of benefits was based on a misconstruction of the "willful misconduct" language of the veterans benefits statute. He contended also that the VA decision constituted discrimination against the handicapped in violation of the Rehabilitation Act, an argument he had not presented in the administrative proceedings.

The district court held that it had jurisdiction to consider McKelvey's claims, stating that Section 211(a) "does not prevent judicial review of challenges to the VA's authority to promulgate regulations" (Pet. App. 36a). On the merits, the district court held that the VA had properly interpreted the "willful misconduct" standard of the veterans' benefits statute. The court noted that when Congress enacted the educational benefits extensions, the VA interpretation of "willful misconduct" already existed (in connection with earlier provisions on disability compensation), and that Congress specifically expressed an intent that the same interpretation be used

(*id.* at 40a, quoting S. Rep. 95-468, 95th Cong., 1st Sess. 69-70 (1977)). The district court reached a different conclusion on the Rehabilitation Act claim, holding that the VA interpretation constitutes discrimination against alcoholics in violation of Section 504 (Pet. App. 43a).

The court of appeals for the District of Columbia Circuit reversed. The court held that while Section 211(a) does not preclude judicial review of the Rehabilitation Act claim, petitioner's substantive statutory claim has no merit.

The court of appeals' decision on the jurisdictional issue rests on "the unusual, perhaps *sui generis* posture of this case" (Pet. App. 6a). The court focused on two particular facts: first, that a veteran is challenging the validity of a regulation under the Rehabilitation Act, a legal issue the Board of Veterans Appeals then regarded itself as lacking authority to decide, and second, that the VA had not otherwise made a determination on that issue prior to the filing of this lawsuit<sup>3</sup> (*id.* at 7a). Since, in the court's view, Section 211(a) is applicable only when a claim has been "resolved by an actual 'decision of the Administrator'" (*ibid.*, quoting *Johnson v. Robison*, 415 U.S. 361, 367 (1974)), it does not bar judicial review in these circumstances. The court emphasized "the narrowness of our holding" (86-737 Pet. App. 9a):

[W]e do not anticipate another occasion to review a VA order on the basis that supports our review today. The VA has now determined it does have authority to decide on the effect and applicability of federal statutes other than veterans' legislation when the agency acts on benefits claims. We therefore expect that the VA will not again regard as outside

<sup>3</sup> In response to the court's request at oral argument, the General Counsel of the VA took the position that the Rehabilitation Act does not invalidate the VA's interpretation of the "willful misconduct" language in Section 1662. The court held, however, that the General Counsel's letter did not constitute a "decision of the Administrator" for purposes of Section 211(a), since it was written after the case started. Pet. App. 7a-8a.

the arsenal of law it applies any potentially relevant congressional enactment.

On the merits, the court concluded that the VA could reasonably distinguish between those whose handicap was caused by their own willful misconduct, and those who are not responsible for their handicap. The VA's conclusion that alcoholics who cannot show an underlying psychiatric disorder are chargeable with willful misconduct reflects "general societal perceptions regarding personal responsibility" (Pet. App. 12a). Moreover, since "[a]lcoholism, unlike any other disability except drug addiction \* \* \*, is self-inflicted \* \* \* [,] [i]t is therefore feasible for alcoholism, as it is not for all other disabilities except drug addiction, to make a generalized determination that willfulness exists unless there is established the singular exculpation for self-infliction (psychiatric disorder) that the agency has chosen to acknowledge" (*id.* at 16a).

In a separate opinion, Judge Ginsburg concurred in the court's holding that Section 211(a) does not bar judicial review in the unique circumstances of this case, and she dissented from the court's holding on the merits (Pet. App. 17a).

Judge Scalia also wrote separately. He dissented from the court's holding that Section 211(a) is not applicable, stating that the "decision of the Administrator" which Section 211(a) immunizes from judicial review necessarily includes all issues within the competence of the agency to decide, "whether or not [the agency] specifically adverts to, or is even aware of them—just as a court necessarily 'decides' all issues logically essential to the validity of its holding whether or not it explicitly addresses or considers them" (Pet. App. 30a). Any other view of Section 211(a), he wrote, would enable "the Administrator \* \* \* to control the scope of judicial review of his determinations by simply designating which underlying issues he chooses not to decide" (Pet. App.



30a). Judge Scalia concurred in the court's decision on the merits, upholding the validity of the VA regulation.

### SUMMARY OF ARGUMENT

1. Section 211(a) bars judicial review in this case. The statute precludes review of "decisions of the Administrator on any question of law or fact under any law administered by the [VA] providing benefits." 38 U.S.C. 211(a). This case may be viewed as involving either a decision denying petitioners benefits, or a decision as to how the "willful misconduct" test of the veterans' benefits statute applies to alcoholics in light of the Rehabilitation Act. In either view, the case involves a "decision[] of the Administrator on any question of law or fact under any [veterans' benefits] law."

The legislative history of Section 211(a) supports this reading. The purpose of Section 211(a) was to avoid involving the courts in "day-to-day determination and interpretation of Veterans' Administration policy," particularly where that policy involves "technical considerations." *Johnson v. Robison*, 415 U.S. 361, 372, 373 (1974). The VA decisional process is tightly controlled by hundreds of regulations, many of them highly detailed and technical, appearing in nearly three hundred pages of the Code of Federal Regulations, 38 C.F.R. Pts. 3 and 4, as well as an even larger number of standards appearing in internal manuals. If challenges to regulations were subject to judicial review, "day-to-day determinations" involving "technical considerations" would be routinely brought into the courts. And many of these cases could be cast as complaints against handicap discrimination under the Rehabilitation Act, since a "disability" claimed to exist under the veterans' benefits law can often be described as a "handicap" under the Rehabilitation Act. Even if only a small percentage of administrative claims were to be litigated, a substantial addition to the federal court docket would result; in fiscal 1986, the Board of Veterans Appeals denied more than 28,000 claims.

2. Even if Section 211(a) were held not to bar judicial review in these cases, petitioners' challenges to the VA decisions would have to be rejected on their merits. The "willful misconduct" test of the veterans' benefits law was expressly intended by Congress to cover alcoholism and drug addiction and to endorse the VA's longstanding interpretation (which was cited in the Senate report). This language represents a deliberate congressional decision that these disabilities are unique in the sense that they frequently involve significant elements of volition. The VA regulations, by focusing the "willfulness" inquiry on whether an underlying psychiatric disorder exists, is a reasonable way of applying the "willful misconduct" test, and should be upheld.

The Rehabilitation Act was not intended to alter or repeal the specific determination by Congress in the veterans' benefits law to treat alcoholism and drug addiction as involving significant elements of volition. The Rehabilitation Act was not intended to forbid differing treatment of different handicaps, particularly where differing treatment is required by some other statute and is supported by significant medical knowledge. Here, even those medical authorities who label alcoholism a "disease" concede that it is a disease that can and often does involve significant elements of volition. Indeed, many authorities stress that the successful treatment of an alcoholic requires that the patient assume personal responsibility for abstaining from drink. In addition, the authorities agree that societal attitudes—which are reflected in laws and regulations—can also influence the prevalence of alcoholism. Just as this Court has rejected the argument that the "disease" label absolves alcoholics from criminal responsibility for their conduct, *Powell v. Texas*, 392 U.S. 514 (1968), so too Congress and the VA have reasonably decided that alcoholics should bear a degree of personal responsibility in connection with a benefits program.

## ARGUMENT

### I. SECTION 211(a) PRECLUDES JUDICIAL REVIEW OF VA DECISIONS ON VETERANS' BENEFITS CLAIMS, INCLUDING DECISIONS RESTING ON VA POLICY OR REGULATIONS AND DECISIONS INVOLVING POINTS OF LAW UNDER OTHER STATUTES

#### A. The Language and Legislative History of Section 211(a) Demonstrate That Congress Intended To Have Veterans' Benefits Claims Decided in an Informal, Nonadversarial Process and Without Judicial Review

Congress created the Veterans Administration in 1930 and vested in the VA responsibility for administering the federal program for veterans' benefits. *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 309 (1985). In the expectation that the system for disbursing veterans' benefits would be as "informal and non-adversarial as possible" (*id.* at 323), Congress did not "contemplate the adversary mode of dispute resolution utilized by courts in this country" (*id.* at 309).<sup>4</sup> In accordance with that expectation, Congress also sought to "protect the Administrator from expensive and time-consuming litigation" by precluding judicial review of VA benefits decisions. *Rose v. Rose*, No. 85-1206 (May 18, 1987), slip op. 8; 38 U.S.C. 211(a). See *Walters*, 473 U.S. at 307; *Johnson v. Robison*, 415 U.S. 361, 370 (1974). Section 211(a) sets forth the prohibition of judicial review:

[T]he decisions of the Administrator on any question of law or fact under any law administered by

<sup>4</sup> This Court stated in *Walters* that (473 U.S. at 311) "[t]he process is designed to function with a high degree of informality and solicitude for the claimant. There is no statute of limitations, and a denial of benefits has no formal res judicata effect; a claimant may resubmit as long as he presents new facts not previously forwarded. See 38 C.F.R. §§ 3.104, 3.105 (1984)."

the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

So plain and direct is this statutory proscription of judicial review that this Court has referred to Section 211(a) as the paradigm of the "unambiguous and comprehensive" language Congress employs when it intends to "bar judicial review altogether" (*Lindahl v. OPM*, 470 U.S. 768, 779-780 & n.13 (1985)).<sup>5</sup>

The legislative history of Section 211(a) also strongly supports the conclusion that Congress intended to preclude judicial review in the circumstances of these cases. Section 211(a) was originally enacted as Section 5 of the Economy Act of 1933, ch. 3, 48 Stat. 9 (emphasis added), which provided:

*All decisions rendered by the Administrator of Veterans' Affairs under the provisions of this title,*

<sup>5</sup> In Section 211(a) Congress has provided "clear and convincing" evidence (*Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967)) of its intent that VA benefits decisions not be subject to examination by the courts. Congress has evidenced this intent in terms that are "fairly discernible" in the details of the legislative scheme" and that are sufficiently clear to overcome "the general presumption favoring judicial review of administrative action" (*Block v. Community Nutrition Inst.*, 467 U.S. 340, 351 (1984), quoting *Data Processing Service v. Camp*, 397 U.S. 150, 157 (1970); see *Bowen v. Michigan Academy of Family Physicians*, No. 85-225 (June 9, 1986), slip op. 5 & n.4). That conclusion is supported by reference to the sources to which this Court ordinarily turns in assessing legislative intent: the express language of the statute, "the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved" (*Lindahl v. OPM*, 470 U.S. at 779 (quoting *Block v. Community Nutrition Inst.*, 467 U.S. at 345)). Where, as in these cases, there is "persuasive reason to believe" that Congress sought to preclude review, then that intent must be respected. *Morris v. Gressette*, 432 U.S. 491, 501 (1977); *Abbott Laboratories v. Gardner*, 387 U.S. at 140.



or the regulations issued pursuant thereto, shall be final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review by mandamus or otherwise any such decision.

Congress could hardly prohibit judicial review in more explicit terms (see *Briscoe v. Bell*, 432 U.S. 404, 409 (1977)). The original statutory language clearly applied to all decisions under the veterans' benefits laws, and to all questions of law involved in those decisions, including questions arising under other statutes. An applicant for veterans' benefits seeks a decision under the veterans' benefits laws; and a decision denying a claim for veterans' benefits is a decision under the veterans' benefits laws, whether or not the claim for benefits involves consideration of additional statutes.

There is no indication that subsequent legislative changes in Section 211(a) were intended to change the original meaning. In 1940, the statute was amended to preclude judicial review of "the decisions of the Administrator of Veterans' Affairs on any question of law or fact concerning a claim for benefits or payments under this or any other Act administered by the Veterans' Administration." Act of Oct. 17, 1940, ch. 893, § 11, 54 Stat. 1197 (emphasis added). The Senate Report that accompanied this amendment emphasized what the language of the amendment made obvious: that the statute "provides for the finality of decisions made by the Administrator of Veterans' Affairs on questions relating to claims under any of the laws administered by the Veterans' Administration." S. Rep. 2198, 76th Cong., 3d Sess. 11 (1940) (emphasis added).

Thus, under the 1940 language, as well as the original 1933 language, Congress expressed its intent to preclude judicial review of all benefits decisions made by the VA Administrator, including decisions that involve questions of law arising under other statutes.

After a minor amendment in 1957 not affecting the present case,<sup>6</sup> the statute was amended in 1970 to preclude review of "decisions of the Administrator on any question of law or fact under any law administered by the [VA]." Act of Aug. 12, 1970, Pub. L. No. 91-376, § 8(a), 84 Stat. 790, codified at 38 U.S.C. 211(a). The 1970 amendment represented Congress's response to several decisions by the United States Court of Appeals for the District of Columbia Circuit that had construed the preclusion of judicial review too narrowly.

As this Court explained in *Johnson v. Robison*, 415 U.S. 361, 371, 373 (1974) (emphasis in original), the 1970 amendment was designed to *restore* the provision to its original unqualified meaning:

Before [the 1970] amendment, the no-review clause made final "the decisions of the administrator on any question of law or fact concerning a claim for benefits or payments under [certain] law[s] administered by the Veterans' Administration" (emphasis added), 38 U.S.C. § 211(a) (1964 ed.), 71 Stat. 92. In a series of decisions, *e.g.*, *Wellman v. Whittier*, 104 U.S. App. D.C. 6, 259 F.2d 163 (1958); *Thompson v. Gleason*, 115 U.S. App. D.C. 201, 317 F.2d 901 (1962); and *Tracy v. Gleason*, 126 U.S. App. D.C. 415, 379 F.2d 469 (1967), the Court of Appeals for the District of Columbia Circuit interpreted the term "claim" as a limitation upon the reach of § 211(a), and as a consequence held that judicial review of actions by the administrator subsequent to an original grant of benefits was not barred.

\* \* \* \* \*

<sup>6</sup> The 1957 amendment changed the statute to preclude judicial review of the Administrator's decision "on any question of law or fact concerning a claim for benefits or payments under any law administered by the Veterans' Administration." Act of June 17, 1957, Pub. L. No. 85-56, § 211(a), 71 Stat. 92. The text of the 1933, 1940 and 1957 versions of the statute appear in *Daylo v. Administrator of Veterans' Affairs*, 501 F.2d 811, 813 (D.C. Cir. 1974).

Thus, the 1970 amendment was enacted to overrule the interpretation of the Court of Appeals for the District of Columbia Circuit \* \* \*.<sup>[7]</sup>

The Chairman of the House Committee on Veterans' Affairs argued that the District of Columbia Circuit's decisions gave "preferential treatment to a limited group of beneficiaries" by providing to them, and them alone, judicial review of VA benefits determinations. 116 Cong. Rec. 26490 (1970) (remarks of Congressman Teague). He recognized that such preferential treatment could be avoided either by making "court review \* \* \* apply to all beneficiaries with equal force" or by making all VA benefits decisions nonreviewable (*ibid.*). In the 1970 amendment Congress sought to restore uniformity to the benefits process by opting for the latter approach. Chairman Teague explained that the statute "would seem to be perfectly clear in expressing the congressional intent that any and all decisions of the Administrator on questions of entitlement to veterans' benefits—[with the exception of claims on insurance contracts]—were to be final and not subject to judicial review." 116 Cong. Rec. 19734 (1970).

In sum, the history of Section 211(a) demonstrates that prior to the 1970 amendment, the statutory preclusion of review plainly applied to all decisions of the Administrator under the veterans' benefits laws, even where questions of law were raised under other statutes. The 1970 amendment was not intended to change this result; instead, it was designed to reaffirm the original meaning by overruling a series of judicial decisions that Congress viewed as erroneously narrowing the statute.

<sup>7</sup> This Court's reading of the 1970 amendment, as intended to reaffirm the original meaning of the statute, is confirmed by the fact that in the 1970 amendment Congress retained the effective date of October 17, 1940. Pub. L. No. 91-376, § 8(a), 84 Stat. 790. Had the 1970 amendment been intended as a change, presumably a 1970 effective date would have been used.

## B. The Legislative Purpose of Section 211(a) Supports Preclusion of Review in These Cases

This Court recently observed that the principal purposes of Section 211(a) are "to achieve uniformity in the administration of veterans' benefits and protect the Administrator from expensive and time-consuming litigation" (*Rose v. Rose*, No. 85-1206 (May 18, 1987), slip op. 8). Cognizant of these purposes, the Court has stated that Congress sought to avoid "involv[ing] the courts in day-to-day determination and interpretation of Veterans' Administration policy," particularly where that policy involves "technical considerations." *Johnson v. Robison*, 415 U.S. at 372, 373.<sup>8</sup> These legislative purposes would

<sup>8</sup> The courts have articulated only two limited exceptions—not applicable here—to the statutory bar on judicial review: where a challenge is made to the constitutionality of a statute (*Johnson v. Robison*, *supra*) and where a challenge to a VA policy is made, not by a party seeking benefits, but by a third party affected by the policy who has no opportunity to be heard in administrative proceedings. See, e.g., *Evergreen State College v. Cleland*, 621 F.2d 1002 (9th Cir. 1980); *University of Maryland v. Cleland*, 621 F.2d 98 (4th Cir. 1980); *Merged Area X (Education) v. Cleland*, 604 F.2d 1075 (8th Cir. 1979); *Wayne State University v. Cleland*, 590 F.2d 627 (6th Cir. 1978). The cases in the latter group were not brought by veterans seeking review of denials of benefits claims. Rather, they were brought by "educational institutions interested in the overall administration of the VA educational benefits program" (86-622 Pet. App. 18a). Petitioners argue (Br. 46 n.31) that in *Wayne State* and *Merged Area X* the educational institutions were joined as plaintiffs by individual veterans; but there is no indication in those opinions that the veterans were seeking to challenge their individual benefits determinations, or even that the VA had denied benefits to those veterans. In fact, the courts' rationale makes it clear that had the plaintiffs challenged the outcomes of individual benefits determinations, the courts would have held that Section 211(a) barred jurisdiction (604 F.2d at 1078; 590 F.2d at 632).

In situations where neither of these limited exceptions obtains, the general rule has prevailed, precluding judicial review of benefits decisions at the behest of the veteran. E.g., *Barefield v. Byrd*, 320 F.2d 455 (5th Cir. 1963); *Milliken v. Gleason*, 332 F.2d 122 (1st Cir. 1964), cert. denied, 379 U.S. 1002 (1965); *Redfield v.*



plainly be advanced by precluding judicial review in these cases. Despite petitioners' efforts to portray this litigation as something other than a challenge to the VA's benefits decisions in their particular cases, each petitioner's complaint focuses on the circumstances of his individual benefits determination and each complaint requests the court to "[g]rant [petitioner's] application for an extension of his delimiting date" (J.A. 31; see *id.* at 129). Thus petitioners plainly seek to involve the courts in the "day-to-day determination and interpretation" of VA policy, a result that is directly contrary to Congress's objective.

Petitioners offer three arguments in favor of creating an exception to Section 211(a) in these cases: that law-

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*Driver*, 364 F.2d 812 (9th Cir. 1966); *Fritz v. Director of Veterans Administration*, 427 F.2d 154 (9th Cir. 1970); *Wickline v. Brooks*, 446 F.2d 1391 (4th Cir. 1971), cert. denied, 404 U.S. 1061 (1972); *Ross v. United States*, 462 F.2d 618 (9th Cir. 1972); *De Rodulfa v. United States*, 461 F.2d 1240 (D.C. Cir.), cert. denied, 409 U.S. 949 (1972); *Holley v. United States*, 352 F. Supp. 175 (S.D. Ohio 1972), aff'd without opinion, 477 F.2d 600 (6th Cir.), cert. denied, 414 U.S. 1023 (1973); *Anderson v. VA*, 559 F.2d 935 (5th Cir. 1977); *Rosen v. Walters*, 719 F.2d 1422, 1424-1425 (9th Cir. 1983); *Pappanikolou v. Administrator of the Veterans Administration*, 762 F.2d 8, 9 (2d Cir. 1985); *Roberts v. Walters*, 792 F.2d 1109 (Fed. Cir. 1986).

It is true that, as petitioners state (Br. 42-45), there came a time long after Section 211(a) was enacted, and more than a decade after it was last amended, when the Administrator of the VA wrote that Section 211(a) "does not protect every decision, policy, or action of the VA from judicial scrutiny" (130 Cong. Rec. S6160 (daily ed. May 22, 1984)). That statement was not made in connection with the enactment, amendment, or reenactment of Section 211(a). The same is true of the floor statements, cited by petitioners (Br. 44-45), made by several individual members of the Senate in 1984, which are in any event inconclusive (see 130 Cong. Rec. S6158 (daily ed. May 22, 1984) (remarks of Senator Cranston) ("the VA and the Justice Department, despite my urging, refuse to agree to stop raising in court the bar to judicial review—section 211(a) of title 38—as a defense in all cases challenging VA regulations")). These snippets of subsequent legislative materials thus provide no guidance as to Congress's intent in enacting Section 211(a) in 1933 and amending it in 1940 and 1970.

suits challenging the legality of a policy or regulation should be permitted even if judicial review of individual benefit determinations is barred; that these cases involve decisions under the Rehabilitation Act rather than under a veterans' benefits statute; and that in these cases the VA did not conclusively decide the question arising under the Rehabilitation Act, so there is no "decision" to trigger the preclusion of review under Section 211(a). We address each contention in turn.

1. Petitioners' first theory would mean, at a minimum, that the VA's regulations as well as its manuals would be open to judicial review.<sup>9</sup> The courts would then face precisely the dangers that Congress sought to avoid, because these regulations and manuals are filled with detailed, technical provisions, prescribing in elaborate detail how veterans' benefits claims are to be decided.

The VA regulations comprise 272 pages in the 1986 edition of the Code of Federal Regulations (38 C.F.R. Pts. 3 and 4, at 126-398) and include detailed provisions on difficult and controversial subjects. For example, 11 pages address the question whether a disability is service-connected (38 C.F.R. 3.303-3.312), with detailed provisions relating to claims based on exposure to herbicides in Vietnam and exposure to ionizing radiation (38 C.F.R. 3.311a, 3.311b).<sup>10</sup> Part 4 has 95 pages elaborating on the rating of particular conditions, including 11 pages on neurological, convulsive and mental disorders (38 C.F.R. 4.120-4.132), as well as other provisions on im-

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<sup>9</sup> VA policy is typically embodied in two forms: (1) regulations appearing in Title 38 of the Code of Federal Regulations, and (2) internal manuals that amplify and explain the regulations. The present cases involve both types of policy enactment: the VA regulation (38 C.F.R. 3.301(c)(2)) and the VA's Adjudication Manual, which expands upon the terse language of the regulation.

<sup>10</sup> There is presently pending a suit challenging the VA's regulations and policies with respect to veterans' claims for disabilities allegedly resulting from exposure to herbicides in Vietnam. *Nehmer v. Veterans Administration*, No. 86-6160TEH (N.D. Cal.).

pairment of the musculoskeletal system (38 C.F.R. 4.40-4.73—25 pages), visual impairment (38 C.F.R. 4.75-4.84a—8 pages), auditory impairment (38 C.F.R. 4.85-4.87a—4 pages), cardiovascular diseases (38 C.F.R. 4.100-4.104—4 pages), and mental disorders (38 C.F.R. 4.125-4.132—5 pages).

The Code of Federal Regulations represents only the beginning of potentially litigable issues concerning veterans' disability claims should Section 211(a) be construed to have an implicit exception for VA regulations and policies. An even greater volume of policy pronouncements exists in manuals that amplify the rules set forth in the Code of Federal Regulations. These manuals constitute "instructions of the Administrator" that are binding on the Board of Veterans Appeals under 38 U.S.C. 4004. Under petitioners' construction of Section 211(a), the VA manuals would be subject to judicial review. See Pet. Br. 38-39.

For example, the VA regulation on alcoholism that is contained in the Code of Federal Regulations does not discuss the relationship between alcoholism and psychiatric disorders; for guidance on this topic, one must turn to the VA Manual M21-1, ch. 50, § 50.40a.(1) (entitled *Rating Procedure Relative to Specific Issues*), Subchapter XII (entitled *Mental Disorders*). The VA Manual M21-1, which prescribes policies for disability adjudications, has 56 chapters. Of these, at least 25 chapters contain provisions that are potential targets of litigation. In addition, another VA Manual M22-2 governs adjudication of claims for educational benefits; Parts II, III and IV of Manual M22-2, which deal with substantive issues arising in educational benefits claims, contain 31 chapters with detailed provisions that are potential targets of litigation.

With this volume of regulatory material waiting in the wings, it is apparent that the suggestion that judicial review be permitted for challenges to regulations and

policies would profoundly distort the informal, nonadversarial scheme Congress envisioned.<sup>11</sup>

Petitioners' reading of Section 211(a) finds no support either in the statutory language or in any conceivable view of the legislative intent. The language of the statute precludes review of "decisions of the Administrator on any question of law." The statute does not, as petitioners would have it, limit preclusion of review to "decisions of the Administrator on any question of law (except for decisions embodied in a regulation or manual)."

Nor is there any reason to suppose that Congress intended to except from the statutory bar on judicial review those decisions of law that are embodied in VA regulations. Such an exception would serve no discernible congressional purpose. The VA, like most administrative agencies, is free to develop substantive standards under its governing statute either by regulation, by case-by-case adjudication, or by a combination of the two. *NAACP v. FPC*, 425 U.S. 662, 668 (1976); *SEC v. Chenery Corp.*, 332 U.S. 194, 202-203 (1947). While there may be instances in which reliance on adjudication rather than rulemaking would be an abuse of discretion, *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974), certainly in applying the "willful misconduct" standard of the veterans' benefits statute—as well as the anti-discrimination provision of the Rehabilitation Act—the

<sup>11</sup> Nor is it accurate to suggest that judicial review of challenges to policies and regulations would not greatly burden the VA with litigation because, unlike lawsuits challenging individual benefits decisions, the validity of a policy or regulation need be litigated only once. Nothing requires all possible challenges to a regulation by various persons to be presented in a single lawsuit, and a regulation could be challenged unsuccessfully by different persons many times. Revisions in the regulations would be subject to similar challenges. And even if it were true that each policy or regulation would be the subject of litigation only once, the sheer volume of VA policies and regulations would produce the substantial, costly litigation Congress precluded.



VA has discretion to develop standards through the process of case-by-case adjudication rather than by regulation. In fact, the VA's interpretation of the statutory "willful misconduct" standard as applied to alcoholism originated in decisions on specific benefit claims (see page 3, *supra*; pages 28-29, *infra*).

Under petitioners' interpretation, the federal courts could review a policy or legal standard announced in a regulation, but not in an individual decision on a claim for benefits. But they offer no cogent reason why Congress would create—and no evidence that Congress intended to create—a system barring judicial review where an interpretation is adopted in an adjudicative context (with no prior notice to the general public and with retroactive effect on the parties), but allowing judicial review if the same interpretation were adopted prospectively after public notice and comment. If petitioners' theory were the law, then the agency would have a strong incentive to maintain uniformity in its decisions and minimize its litigation costs by developing standards and policies through case-by-case administrative adjudication rather than regulation, thereby depriving the public of the advantages of the public notice and comment involved in rulemaking proceedings. Congress could not have intended such a bizarre result.<sup>12</sup>

<sup>12</sup> The First Circuit, in the context of a statute barring judicial review of actions taken under the Federal Employees Compensation Act (5 U.S.C. 8128(b)), recently characterized an argument identical to petitioners' as a distortion of the statute. *Paluca v. Secretary of Labor*, 813 F.2d 524, 527 (1987). The First Circuit stated (*ibid.* (footnote omitted; emphasis in original)):

It would create the absurd result of permitting a court to strike down a policy statement of the Secretary, notwithstanding the court's inability to review any subsequent individual adjudications for conformance with its policy decision. As recently stated by the Court of Appeals for the District of Columbia, it is individual determinations that "have traditionally been accorded *more* rather than *less* judicial protection against agency error than generally applicable rules. Compare *Bi-Metallic Investment Co. v. State Board of Equalization*, 239

2. Petitioners' second contention is that judicial review is not barred in these cases because the VA's decisions were made under the Rehabilitation Act rather than under a veterans' benefits statute. This is the theory espoused in Judge Kearse's dissenting opinion (86-622 Pet. App. 25a-38a). On this view, Section 211(a) would be limited to instances in which the Administrator's decision was made *exclusively* under a veterans' benefits statute and involved no consideration of other statutes. Petitioners' theory does not flow naturally or comfortably from the language of Section 211(a). The VA decisions denying additional benefits to petitioners and denying petitioners' requests to extend their delimiting dates are, by any standard, decisions under a "law administered by the Veterans' Administration providing benefits." That the VA may have been asked by petitioner McKelvey (though not by petitioner Traynor) to consider the effect of the Rehabilitation Act on his claim under the educational benefits program does not cause the agency's decision to cease being a decision under a veterans' benefits law. It is that law, rather than the Rehabilitation Act, that authorizes the benefits being sought. And, as the legislative history shows (see pages 13-16, *supra*), Congress viewed Section 211(a) as barring review of all decisions of the Administrator implementing a veterans benefits program—regardless of whether those decisions arguably required the administrator to consider additional statutes, such as the Administrative Procedure Act, 5 U.S.C. 706(2)(A) and (E), or the Rehabilitation Act.

Indeed, it is difficult to conceive of a case in which a veteran claiming a "disability" under a veterans' benefits

U.S. 441 (1915) *with Londoner v. Denver*, 210 U.S. 373 (1908)." *Gott v. Walters*, 756 F.2d 902, 915 (1985) (Scalia, J.). \* \* \* [Plaintiffs'] suggestion makes no sense, because the Secretary would be free, in individual adjudications, to ignore anything we say, and because it conflicts with one of the major purposes of § 8128(b): "that the Secretary should be free to make the policy choices associated with disability decisions." *Rodriguez v. Donovan*, 769 F.2d 1344, 1348 (9th Cir. 1985).

statute could not also claim a "handicap" under the Rehabilitation Act. The predictable consequence of a rule allowing judicial review for veterans claiming Rehabilitation Act protection is that such claims would routinely be recited in lawsuits challenging VA benefits decisions. The result would be to involve the courts in "day-to-day determination and interpretation of Veterans' Administration policy" (*Johnson v. Robison*, 415 U.S. at 372)—the very result Section 211(a) was intended to preclude.

3. Petitioners' third theory for avoiding the jurisdictional bar of Section 211(a) is that the statute does not apply here because the VA did not expressly "decide" the question whether the agency's regulation on alcoholism violated the Rehabilitation Act. Petitioners' theory is incompatible with established principles of administrative law.

Even in cases where judicial review of agency action is available, courts employ the exhaustion doctrine in order to insure that the agency has had an opportunity to address the legal questions presented. Among the salutary effects of the exhaustion doctrine are that the agency decision may dispose of the matter in a fashion that makes further review unnecessary and that, should judicial proceedings ensue, the court will have the benefit of the agency's views. *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975); *McKart v. United States*, 395 U.S. 185, 200 (1969); cf. *Bowen v. City of New York*, No. 84-1923 (June 2, 1986), slip op. 16-17.

Petitioners' tortured reading of Section 211(a) proceeds from just the opposite premise. Under their theory, judicial review would exist only where a court does not have the benefit of the agency's view on the subject, viz., only on those questions of law raised in the administrative proceedings which the Administrator did not expressly "decide."<sup>13</sup> Conversely, it is only by "deciding"

<sup>13</sup> The extreme reach of the theory is evident on the record in No. 86-737, where petitioner McKelvey did not even raise any question under the Rehabilitation Act in the administrative pro-

an issue that the Administrator could trigger the statutory proscription of judicial review. There is no evidence that Congress intended to make the jurisdiction of the federal courts hinge on the *absence* of an agency's statement of its views on a particular question of law. Nor is there any reason to believe that Congress would have crafted the peculiar system petitioners posit: a system that discourages parties from raising legal issues in agency proceedings (in order to preserve judicial "review") and simultaneously encourages the agency to express views on issues that otherwise would not be reached (in order to preserve the finality of agency adjudication and to defeat judicial review). See 86-737 Pet. App. 30a (Scalia, J., dissenting).

## II. THE VA'S CRITERIA FOR APPLYING THE "WILLFUL MISCONDUCT" STANDARD OF THE VETERANS' BENEFITS LAWS IS A REASONABLE MEANS OF IMPLEMENTING THOSE LAWS AND IS NOT INCONSISTENT WITH THE REHABILITATION ACT

Because the courts lack jurisdiction in these cases, it is unnecessary for this Court to consider petitioners' contention that the challenged VA regulation and the VA's denials of benefits on these cases are violative of the Rehabilitation Act. However, should this Court determine that the jurisdictional issue is not dispositive, the decisions below should be affirmed on the alternative ground that petitioners' Rehabilitation Act claims are without merit.

In challenging the VA's policy on alcoholism, petitioners and amici curiae raise a subject that has long bedeviled scholars in a variety of disciplines: the crafting of a normative cultural view on alcohol and alcoholism.

ceedings. Had he raised the Rehabilitation Act issue, and had that issue been expressly decided by the VA, then presumably Section 211(a) would bar judicial review of that "decision." Petitioner's theory thus would discourage parties from raising before the agency questions on which judicial review may later be sought.



The striking disagreements the subject provokes are reflected in the various descriptions of alcohol as "a valuable food and commodity, a 'gift of God'" (Blume, *Public Policy Issues*, in *Alcoholism and Related Problems: Issues For The American Public* 179 (1984)) and as the "verray sepulture [o]f mannes wit and his discrecioun" (G. Chaucer, *The Canterbury Tales (The Pardoner's Tale)* in *Chaucer's Poetry* 314 (E. Donaldson ed. 1958)).

The complexities of the subject are magnified in these cases by the effort to frame the legal issues within the nomenclature of medicine. The briefs of petitioners and their supporting amici appear to proceed from the assumption that the dispositive issue in the case is whether alcoholism is a disease and, in urging reversal, rely on recent medical literature to support the proposition that it is. But the issue in these cases is not a medical issue, it is the legal issue of determining Congress's intent in enacting the relevant statutes.<sup>14</sup> It is thus of little consequence to the legal analysis whether alcoholism is or is not a disease because that term does not foreclose the possibility of voluntary conduct; nor is the search for the congressional intent underlying statutes enacted in the late 1970's advanced by citations to the medical literature circa 1987. In any event, as we will discuss, despite substantial recent medical progress in the understanding of alcoholism, the observations in this Court's plurality opin-

<sup>14</sup> See *Powell v. Texas*, 392 U.S. at 526 (plurality opinion) (footnote omitted) (pointing out "the conceptual difficulties inevitably attendant upon the importation of scientific and medical models into a legal system generally predicated upon a different set of assumptions"); *id.* at 541 (Black, J., concurring) ("Medical decisions concerning the use of a term such as 'disease' or 'volition,' based as they are on the clinical problems of diagnosis and treatment, bear no necessary correspondence to the legal decision whether the overall objectives of the criminal law can be furthered by imposing punishment."); M. Guttmacher, *The Role of Psychiatry in Law: The Irresistible Impulse* 53-54 (1968) ("It is my earnest hope that the psychiatrist will not be assigned the task of expressing gradations of responsibility for the alcoholic offender but will be required only to furnish clinical diagnoses, when that is possible.").

ion in *Powell v. Texas*, 392 U.S. at 522 (footnote omitted; emphasis in original) retain their validity:

the inescapable fact is that there is no agreement among members of the medical profession about what it means to say that "alcoholism" is a "disease." One of the principal works in the field \* \* \* concludes that "a disease is what the medical profession recognizes as such." In other words, there is widespread agreement today that "alcoholism" is a "disease" for the simple reason that the medical profession has concluded that it should attempt to treat those who have drinking problems. There the agreement stops.<sup>[15]</sup>

We therefore focus our analysis of the statutory issues in these cases on the language Congress adopted and its programmatic context, the legislative history, and the longstanding agency interpretation.

#### A. VA Regulations Have Historically Considered Some Forms of Alcoholism to be "Willful Misconduct" Barring Disability Pensions

For many years, disability compensation for veterans has been subject to a statutory bar where "the disability is the result of the veteran's own willful misconduct." 38 U.S.C. 310 (disability compensation for injuries suffered or diseases contracted in line of duty). See also 38 U.S.C. 410 (survivors' benefits); 38 U.S.C. 521 (compensation for non-service connected disabilities).<sup>16</sup> Over

<sup>15</sup> A recent article cited (at 5) in the amicus brief of the American Medical Association, states (*Categories, Careers, and Outcomes of Alcoholism*, *The Lancet* 719 (Mar. 29, 1986) (emphasis added)):

Although the medical and neuropsychiatric consequences of excessive drinking have long been established as matters of clinical concern, the notion that alcoholism—the thing itself—is a "disease" is more recent and more controversial.

<sup>16</sup> The "willful misconduct" test is derived from the benefits statute for World War I veterans. Act of Oct. 6, 1917, ch. 105, § 300, 40 Stat. 405.

the decades in which disability benefits programs for veterans have been administered, the definition of "willful misconduct" has achieved general acceptance in many specific applications, including its application to alcoholism. The VA first had occasion to consider the "willful misconduct" standard in relation to the consumption of alcoholic beverages in an administrative decision in 1931 (Administrator's Decision No. 2 (Mar. 21, 1931) (J.A. 133-137)). In that case, the Administrator granted compensation to veterans who had been paralyzed from drinking "jamaica ginger," on the ground that the substance they drank was not known to be poisonous. In dictum, however, the Administrator stated that "if in the drinking of any beverage for the purpose of enjoying its intoxicating effects, excessive indulgence leads to disability, wilful misconduct would undoubtedly inhere in the act" (*id.* at 136). This dictum was later incorporated in a regulation and manual, which stated the test to be: "Was there excessive indulgence and was it the proximate cause of the injury or disease in question" (*id.* at 139-140).

In 1964 the VA clarified its policy on alcoholism in two significant respects. Taken together these clarifications showed that the willful misconduct standard did not disqualify all alcoholics from receiving benefits and that large categories of persons disabled by alcoholism were expressly permitted to obtain benefits. The Administrator announced these policy modifications in an administrative decision (Administrator's Decision No. 988 (Aug. 13, 1964) (J.A. 138-146)). First, the Administrator drew a distinction between primary alcoholism and alcoholism "secondary to and a manifestation of an acquired psychiatric disorder" and held that the latter condition, secondary alcoholism, is not to be considered as willful misconduct (*id.* at 143).<sup>17</sup> The Administrator's 1964 deci-

<sup>17</sup> By one estimate, 20% to 30% of alcoholics fall within this "secondary" category. See American Medical Association Amicus Br. 7. One of the medical texts cited by amicus National

sion also removed the "willful misconduct" label from those alcoholics, both primary and secondary, whose conditions had produced derivative disabling effects, including "cirrhosis of the liver to gastric ulcer, peripheral neuropathy, vitamin deficiency, chronic brain syndrome or simply acceleration of debility of age" (*id.* at 144).

In 1972, the VA issued its present regulation. Drawing upon the language of the 1931 "jamaica ginger" decision, it states (38 C.F.R. 3.301(c)(2)):

If, in the drinking of a beverage to enjoy its intoxicating effects, intoxication results approximately and immediately in disability or death, the disability or death will be considered the result of the person's willful misconduct.

In issuing the regulation, the VA announced that it was intended to incorporate the principles of the 1964 administrative decision. 37 Fed. Reg. 20335, 20336 (1972) (proposed regulation); 37 Fed. Reg. 24662 (1972) (final regulation). Consequently, the VA Manual incorporates

Council on Alcoholism, Inc. (Br. 14, 19, 26), and by amici American Medical Association, *et al.* (Br. 8), describes as a "major group \* \* \* those alcoholics who develop drinking problems after the onset of a major psychiatric disorder such as manic-depressive illness, anxiety-panic disorder, or schizophrenia. \* \* \* These individuals can be considered secondary alcoholics" (S. Zimberg, *The Clinical Management of Alcoholism* 153 (1982)). The same text stresses that "[a] distinction must be made between the primary and the secondary alcoholic" (*id.* at 20; see *id.* at 40-41). The author of that text, Dr. Zimberg, submitted an affidavit in the district court in No. 86-622 (J.A. 56-80).

An article cited as authoritative by the amici American Medical Association, *et al.* endorses distinctions between primary and secondary alcoholism, describing a survey indicating that secondary alcoholism is more difficult to control. *Categories, Careers, and Outcomes of Alcoholism*, *The Lancet* 719 (Mar. 29, 1986). In this survey, the primary alcoholics had a "lower intensity of drinking, and fewer social problems than most in the secondary categories," while the secondary alcoholics had "the poorest clinical outcomes with, as might be expected, higher rates of social and forensic problems" (*ibid.*).



the 1964 decision, stating that alcoholism is not a compensable disability unless it is "secondary to and a manifestation of a psychotic, psychoneurotic or psychophysiologic disorder," in which case the rating official is to "consider the alcoholism part and parcel of the disability and rate as one disease entity, e.g., schizophrenia with alcoholism." VA Manual M21-1, ch. 50, Subchapter XII (see S. Zimberg, *supra*, at 41). Thus, by 1977, when Congress enacted the provision extending for disabled veterans the ten-year limitation on educational benefits, the "willful misconduct" exclusion had a long history and an established administrative interpretation.

**B. The 1977 Amendment of the G.I. Bill Incorporated the VA's Existing "Willful Misconduct" Test**

Since the 1940's the VA has granted educational assistance to eligible veterans. Congress added the ten-year delimiting period in 1974 (Pub. L. No. 93-337, § 1(1), 88 Stat. 292). In 1977, Congress amended the statute to provide for the first time for extensions of the delimiting period for veterans who were prevented from initiating or completing their education "because of a physical or mental disability which was not the result of such veteran's own willful misconduct." Pub. L. No. 95-202, Title II, § 203(a)(1), 91 Stat. 1439, 38 U.S.C. 1662(a)(1).

The legislative history of the 1977 amendment shows that in choosing the term "willful misconduct" Congress was aware that it was requiring the same test that was already in the statute as a bar to disability pensions, and that Congress intended to adopt the interpretation the VA had already given to that term in the disability pension context. The report of the Senate Veterans' Affairs Committee makes explicit the legislative awareness of and acquiescence in the VA interpretation of "willful misconduct." The Senate Report states that "[i]n determining whether the disability sustained was a result of the veteran's own 'willful misconduct', the Committee

intends that the same standards be applied as are utilized in determining eligibility for other VA programs under title 38. In this connection, see 38 CFR part III, paragraphs 3.1(n) and 3.301 [the "willful misconduct" regulation], and VA Manual M21-1, section 1404."<sup>18</sup> S. Rep. 95-468, 95th Cong., 1st Sess. 69-70 (1977). This Court has often stated that committee reports "contain the authoritative source for finding the Legislative intent" and "represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation" (*Garcia v. United States*, 469 U.S. 76, 76 (1984), quoting *Zuber v. Allen*, 396 U.S. 168, 186 (1969)).

The legislative history of the 1977 amendment thus confirms the conclusion otherwise indicated by settled principles of statutory construction: that Congress's use of the term should be given the same meaning in all applications. See *Morrison-Knudsen Construction Co. v. Director, OWCP*, 461 U.S. 624, 633 (1983); *Bob Jones University v. United States*, 461 U.S. 574, 586-587 & n.10 (1983); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 489 (1985). The conclusion that Congress chose to have the VA apply the same test in the same manner to both disability pensions and education benefits is well-supported by the factors this Court ordinarily employs in assessing whether an administrative interpretation is faithful to legislative intent. As this Court observed in an analogous context in *Alcoa v. Central Lincoln Peoples' Utility District*, 467 U.S. 380, 390 (1984): "[t]he subject under regulation is technical and complex. [The agency] has longstanding expertise in the area, and was intimately involved in the drafting and consideration of the statute by Congress. Following enactment of the

<sup>18</sup> The cited Manual provision states that "[b]asic principles for application in deciding cases involving alcoholism are stated in Administrator's Decision No. 988 \* \* \*." Administrator's Decision No. 988 is the 1964 decision upon which the VA regulation is based (see J.A. 138-146).

statute the agency immediately interpreted the statute in the manner now under challenge." Moreover, the Administrator, whose interpretation is entitled to considerable deference, has consistently and prominently interpreted the term "willful misconduct" with regard to alcoholism both before and after passage of the 1977 amendment; Congress was aware of the Administrator's interpretation and therefore should, at the very least, be viewed as having implicitly approved that interpretation when it employed the same term in the 1977 amendment (*City of Pleasant Grove v. United States*, No. 85-1244 (Jan. 21, 1987), slip op. 5-6; *United States v. Sheffield Bd. of Comm'rs*, 435 U.S. 110, 131-135 (1978)). In fact, Congress's approval is explicitly stated in the Senate report. It is, accordingly, clear that in 1977, when Congress enacted the extension of the delimiting period for disabled veterans whose disability was not caused by willful misconduct, Congress understood precisely how that language would be interpreted in cases where the claimed disability is alcoholism.

**C. The 1978 Rehabilitation Act Amendment did not Alter the Effect of the 1977 G.I. Bill Amendment**

Despite the clarity of the situation in 1977, petitioners and amici supporting them contend that subsequent events have overtaken Congress's explicit approval of the relevant VA regulation. Although cast in different forms, petitioners' principal argument is that amendments to the Rehabilitation Act in 1978 effectively nullified the VA regulation. Thus, petitioners contend that alcoholism should be regarded as a disease, that the conduct of drinking is inseparable from the disease itself, and therefore that the Rehabilitation Act prohibits the VA from concluding that an alcoholic's drinking can ever have a volitional component.<sup>10</sup> Under this argument, an

<sup>10</sup> The very existence, let alone extensive membership, of the Alcoholics Anonymous organization (see pages 45-47, *infra*) is not easily reconciled with this aspect of petitioners' contentions.

alcoholic veteran who had been disabled by drinking during the statutory period is ipso facto entitled to an extension of the delimiting period for educational benefits.<sup>20</sup> Since the same "willful misconduct" standard applies also to the grant of veterans' disability pensions, acceptance of petitioners' argument would lend credence to the quite surprising notion that the government is obligated to pay disability pensions to all persons claiming to suffer from alcoholism.

Petitioners' argument is seriously flawed. As we now discuss, the 1978 amendments to the Rehabilitation Act did not repeal the recent congressional judgment that extensions of the delimiting period would be unavailable to persons who bear some responsibility for their disabilities. Nor does the Rehabilitation Act prevent the government from making reasonable distinctions among types of handicaps.

Before we turn to that discussion, some further context for the issues is useful. We have said that the issue in this case is not whether alcoholism is a disease, nor is there an issue whether alcoholism is a handicap cognizable under the Rehabilitation Act (see 43 Op. Att'y Gen. 12 (1977)). For, even if it is a disease, it would not necessarily follow that all alcoholics are disabled. The statute requires that a veteran suffer from a *disability* in order to qualify for an extension of his delimiting period. Moreover, even if one accepts the disease conception of alcoholism and considers only those veterans whose alcoholism is disabling, that would not necessarily preclude scrutiny of the veteran's conduct or his volition as a contributing cause of his disability.

<sup>20</sup> Amici American Medical Association, *et al.* make a somewhat different argument. Conceding that the Rehabilitation Act still allows the G.I. Bill's "willful misconduct" standard to be applied to alcoholics, the amici argue that the Act requires the determination to be made on a case-by-case basis, without the aid of any regulation requiring the factfinder to focus on the presence or absence of an underlying psychological disorder.



Alcoholism, like drug addiction, may well be a disease as petitioners argue; but, as even the medical authorities cited by amici recognize, alcoholism "cannot be reified but reflects a collection of various symptoms and episodic behaviors that collectively make up perhaps as many alcoholisms as there are alcohol abusers" (G. Vaillant, *The Natural History of Alcoholism* 3 (1983)). In short, alcoholism is not a unitary condition. Substance abuse, particularly alcoholism, has multiple forms and ranges of severity,<sup>21</sup> and is acknowledged to be unlike other diseases in the sense that it frequently involves a significant volitional element, in both its genesis and its treatment.<sup>22</sup> As we show, it is reasonable in the con-

<sup>21</sup> See, e.g., E. Jellinek, *The Disease Concept of Alcoholism* 35-41 (1960) (identifying five different types of alcoholics, only two of which are regarded as suffering from a "disease"); S. Zimberg, *supra*, at 20 (distinguishing between primary and secondary alcoholism); Bohman, *et al.*, *Maternal Inheritance of Alcohol Abuse*, 38 Arch. Gen. Psychiatry 965, 968 (1981) (describing genetically different types of susceptibility to alcoholism, each producing a different form of alcoholism); Cloninger, *et al.*, *Inheritance of Alcohol Abuse: Cross-Fostering Analysis of Adopted Men* 38 Arch. Gen. Psychiatry 861, 867 (1981) (identifying two types of alcohol abuse with different genetic and environmental causes); Schuckit, *Genetic Aspects of Alcoholism*, 15 Annals of Emergency Medicine 991-992 (1986) (distinguishing primary alcoholism from secondary alcoholism, which occurs "in the context of another major preexisting psychiatric illness"); American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 129-138, 163-170 (3d ed. 1980) [hereinafter DSM-III] (identifying seven organic mental disorders attributed to the ingestion of alcohol, all of which are distinguished from alcohol abuse and alcohol dependence).

"[A]lcohol abuse reflects a multidetermined continuum of drinking behaviors whose determinants are differently weighted for different people and include culture, habits, social mores, and genes" (G. Vaillant, *supra*, at 17). See Zimberg, *Office Psychotherapy of Alcoholism in Alcoholism and Clinical Psychiatry* 218 (J. Solomon ed. 1982) ("alcoholism does not occur as an all-or-none phenomenon but has varying degrees in the same individual").

<sup>22</sup> One medical commentator states that "[l]ike an automobile driver who chooses to drive rapidly down a busy highway in a car

text of this particular disease, unlike other diseases, for the VA to draw a distinction based on a showing of an underlying psychological disorder or disabling derivative effects; it is a distinction that is paralleled in the medical literature and that faithfully implements Congress's decision not to permit extensions of the delimiting period (or disability pensions) for veterans whose disabilities were caused by willful misconduct. Although the VA policy may not be expressed in precisely the terms medical science would use, and although the policy may not produce in an individual case the same conclusion another arbiter might reach, the VA policy provides a reasonable and workable accommodation of modern medicopsychological evidence and Congress's instructions in the veterans' benefits statute. Perhaps, as medical science makes further advances, some modification of the statutory standard will be indicated; but that is a judgment to be made by Congress, not by the courts.

### 1. *The Rehabilitation Act does not prohibit reasonable distinctions among different types of handicaps*

When first enacted in 1973, the Rehabilitation Act's bar on discrimination against handicapped persons did not apply to federal government programs; it was limited to federally-funded programs and activities. Pub. L. No. 93-112, Tit. V, § 504, 87 Stat. 394. The original statutory definition of a handicapped individual was a person who has a physical or mental disability that results in a substantial handicap to employment (Pub. L. No. 93-112, § 7(6), 87 Stat. 361). Congress expanded that definition in 1974 to include, for purposes of Section 504, a person who has a physical or mental impair-

with defective brakes and ends up spending two years in an orthopedic rehabilitation clinic, the alcoholic may consciously have made some early decisions related to his eventual disorder. But such conscious choice becomes less and less important with the passage of time" (G. Vaillant, *supra*, at 17).

ment which substantially limits one or more major life activities, has a record of such impairment, or is regarded as having such impairment. Pub. L. No. 93-516, Tit. I, § 111(a), 88 Stat. 1619. In the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Pub. L. No. 95-602, Tit. I, 92 Stat. 2955), Congress further amended the Rehabilitation Act in two ways that are significant to this case.

Section 504 was amended to prohibit discrimination "under any program or activity conducted by any Executive agency or by the United States Postal Service," and required the heads of those agencies to promulgate regulations prohibiting discrimination against handicapped persons (Pub. L. No. 95-602, Tit. I, §§ 119, 122(d) (2), 92 Stat. 2982, 2987, 29 U.S.C. 794). Congress also amended the definition of "handicapped person" to state that for purposes of Section 504, in the employment context, the term "does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others" (Pub. L. No. 95-602, Tit. I, § 122(a) (6), 92 Stat. 2985, 29 U.S.C. 706(7) (B)).

Petitioners' principal contention is that the 1978 amendments to the Rehabilitation Act invalidated the VA regulation concerning alcoholism. Since Congress had expressly approved that VA regulation in 1977, petitioners' argument is reduced to the proposition that the Rehabilitation Act amendments implicitly repealed the 1977 VA Benefits Law amendments.<sup>23</sup> The short answer

<sup>23</sup> Of course, Congress did not expressly repeal the 1977 VA amendments. Moreover, neither the language nor the legislative history of the 1978 Rehabilitation Act amendments evidences any congressional awareness of an effect on the veterans' educational benefit extension provision or any congressional intent to repeal a standard it had endorsed just one year earlier.

to petitioners' argument is, as this Court has stated repeatedly, that a subsequent statute will not be held to repeal an earlier statute by implication, especially where the later enactment is general and the earlier statute is specific. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976); *Morton v. Mancari*, 417 U.S. 535, 550-551 (1974); *Silver v. NYSE*, 373 U.S. 341, 357 (1963); *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936); *Wood v. United States*, 41 U.S. (16 Pet.) 342, 363 (1842).

Moreover, there are strong indications that Congress regarded the 1977 G.I. Bill amendment and the VA regulation as retaining their full force notwithstanding the 1978 Rehabilitation Act amendment. In 1979, the Senate Committee on Veterans' Affairs revisited the VA's interpretation of the "willful misconduct" test for extensions of the delimiting period as that test applied to alcohol or drug dependence disabilities. Although, upon reexamination, the Committee preferred to have the VA grant a "delimiting period extension when the veteran was prevented, during part or all of the ordinary 10-year delimiting period, from using GI Bill benefits by a drug or alcohol disability and the veteran has recovered from the disability," the Committee recognized that new legislation would be needed to effect that result since the VA's contrary interpretation had been expressly endorsed in the Senate Report accompanying the 1977 amendment. S. Rep. 96-314, 96th Cong., 1st Sess. 25 (1979). Accordingly, the Committee concluded that "in light of the legislative history [of the 1977 amendments], the VA has had little choice but to deny such extensions involving alcohol and drug abuse or addiction disabilities" (*ibid.*). On four occasions between 1979 and 1984 the Senate passed bills containing amendments that would have eliminated the "willful misconduct" test for VA educational benefits extensions (while retaining the test for VA disability benefits), but none of the bills passed the House. See S. Rep. 98-604, 98th Cong., 2d Sess. 38-39 (1984) (summarizing legislative history).



There is not the slightest suggestion in the legislative history that, as petitioners' theory assumes, modification of the G.I. Bill was regarded as unnecessary in light of the Rehabilitation Act's 1978 amendments. Rather, "despite the [Senate] Committee's strongest urgings, the House would accept neither the GI Bill nor the rehabilitation program provision for delimiting-period extensions based on drug or alcohol disabilities" (*id.* at 39); see 126 Cong. Rec. 27578 (1980) (remarks of Senator Cranston, Chairman, Committee on Veterans' Affairs) ("the House was adamant in its refusal to accept this provision"). If, as petitioners urge, the Rehabilitation Act amendments invalidated the VA regulation on alcoholism or superseded that regulation with respect to the educational benefits delimiting-period extension, that fact seems to have eluded Congress.

The various refinements of petitioners' theory are similarly flawed. Petitioners contend, for example, that the Rehabilitation Act proscribes distinctions among different types of handicaps and that the VA runs afoul of that standard by imposing only on veterans disabled by alcoholism (and drug dependence) the burden of proving that their disability was not the result of willful misconduct. The range of handicaps covered by the Rehabilitation Act is extensive, including a wide variety of conditions from mental illness, alcoholism and drug addiction, to all types of serious physical afflictions.<sup>24</sup> Obviously, different handicaps present different problems; no

<sup>24</sup> In proposing the original regulations under the Rehabilitation Act, HEW referred to "the diversity of existing handicaps and the differing degree to which particular persons may be affected." 41 Fed. Reg. 20296 (1976). The regulations define "handicapped persons" in terms of "physical or mental impairments" which substantially limit one or more major life activities (or are regarded as doing so); "physical or mental impairment" includes "orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism." 28 C.F.R. 41.31(a) and (b)(1).

one would contend, for example, that a blind person and a paralyzed person must be treated in identical fashion. The Rehabilitation Act's general prohibition of discrimination against handicapped persons has never been construed to preclude government agencies from recognizing the differences among handicaps in determining how best to deal with them.<sup>25</sup> In each case, the nature of the particular handicap must be considered in determining what is required by the Act. See *Southeastern Community College v. Davis*, 442 U.S. 397 (1979) (deaf applicant for nursing school); *Doe v. New York University*, 666 F.2d 761 (2d Cir. 1981) (medical school applicant with history of mental illness).

These considerations are particularly relevant where the differing treatment of a particular handicap is required by statute. HEW's implementing regulations under the Rehabilitation Act of 1973 (applying to federally-funded programs) provide that "exclusion of a specific class of handicapped persons from a program limited by Federal statute or executive order to a different class of handicapped persons" is not prohibited by the Act. 42 Fed. Reg. 22676, 22679 (1977), promulgating 45 C.F.R. 84.4 (c); see 28 C.F.R. 41.51(c) (HEW coordinating regulation for federally-assisted programs), 28 C.F.R. Pt. 39 (Department of Justice regulations), 38 C.F.R. 18.404(c) (VA regulation for federally-assisted programs), 52 Fed. Reg. 25124 (1987) (VA notice of proposed regulation for federally-conducted programs). This Court has "recognized [the HEW] regulations as

<sup>25</sup> Indeed, Congress has itself enacted legislation providing benefits only to persons suffering from certain handicaps (*e.g.*, 29 U.S.C. 721(a)(5), 706(13) ("severe handicaps")), legislation that grants priorities only to persons with a specific disability (*e.g.*, Pub. L. No. 93-516, Tit. II, §§ 201-210, 88 Stat. 1622-1630 (blindness)), and legislation that expressly excludes persons with certain handicaps from eligibility (*e.g.*, Rehabilitation Act § 7(7)(B), 29 U.S.C. 706(7)(B), which, in specified circumstances, excludes persons who abuse alcohol or drugs from the definition of "handicapped person").

an important source of guidance on the meaning of section 504." *Alexander v. Choate*, 469 U.S. 287, 304 n.24 (1985); *School Bd. of Nassau County v. Arline*, No. 85-1277 (Mar. 3, 1987), slip op. 5; *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984); *Southeastern Community College v. Davis*, 442 U.S. 397, 413 (1979).

The HEW regulation is persuasive authority here. In the 1977 G.I. Bill amendment, Congress allowed handicapped persons to utilize educational benefits beyond ten years following their discharge, but restricted this special allowance to cases not involving "willful misconduct."<sup>26</sup> In doing so, Congress obviously focused on alcoholism and drug addiction, as evidenced not only by the Senate report's citation and approval of the VA's regulation (discussed at pages 30-31 *supra*), but its use of the same language that had already been interpreted in the context of disability pensions to include alcoholism and drug addiction. Thus, in 1977 Congress mandated separate treatment of drug and alcohol addiction under a "willful misconduct" standard; the HEW regulation and subsequent implementing regulations by other agencies properly recognize that it was never the intent of the Rehabilitation Act to alter existing statutes requiring separate treatment of different handicaps.

**2. There is a reasonable basis for treating alcoholism differently from other handicaps for purposes of veterans' benefits programs**

As we have explained, Congress directed the VA to apply the same "willful misconduct" standard to applicants for educational benefits extensions as to applicants for disability pensions. In assessing the reasonableness of the VA's interpretation of "willful misconduct," it is therefore necessary to consider the consequences of that

<sup>26</sup> Given the limited resources available for veterans' benefits, Congress may reasonably place limitations on eligibility for such benefits, and it is Congress's prerogative to determine the manner in which priorities will be set and resources allocated. Cf. *McDonald v. Board of Elections*, 394 U.S. 802, 809 (1969).

interpretation in both contexts, yet petitioners do not explain how the Rehabilitation Act would require a change in the VA regulation interpreting the willful misconduct standard when that standard is applied to the educational benefits program but not when it is applied to disability pensions.<sup>27</sup>

Congress has clearly stated the reasons for its reluctance to grant disability pensions to alcoholics or drug addicts (S. Rep. 96-314, *supra*, at 25-26):

In the context of [the disability compensation] program, the rate and duration of benefits depend directly upon the severity and duration of the disability. Thus, an individual receiving benefits under that program for alcoholism or drug addiction would have a strong financial incentive—in the form of a higher rate of compensation or the continuation of receipt of compensation—in the worsening or prolongation of the disability, both of which are to some extent within his or her control because they depend upon the amount, frequency, and duration of his or her consumption of alcoholic beverages or drugs.

One may differ, as a matter of policy, on the question whether extensions of the ten-year limitation on educational benefits for alcoholic veterans should be measured by the same standard as disability pensions. In its several recent efforts to enact legislation repealing the "willful misconduct" bar to educational benefits extensions while retaining it for disability pensions, the Senate Committee on Veterans' Affairs has urged that a different standard be used for each program on the ground that

<sup>27</sup> There is presently pending in the Third Circuit a case in which an alcoholic veteran is challenging the VA "willful misconduct" regulation as applied to claims for disability pensions on the basis of alcoholism. *Buck v. Veterans Administration*, No. 86-1656. The Third Circuit has stayed proceedings in that case pending this Court's decision in the present cases. Amicus Vietnam Veterans of America states (Br. 2-3) that one of its reasons for participating here is its participation in *Buck*.



educational benefits cases involve recovered alcoholics who should be rewarded for their recovery and encouraged to go to school (S. Rep. 96-314, *supra*, at 25-26):

[T]he Committee would anticipate that the GI Bill educational assistance would have considerable value to the social and economic rehabilitation of veterans who have recovered from disabilities related to alcohol or drugs.

See also S. Rep. 98-604, *supra*, at 38-39. Congress's repeated rejection of that argument, however, has not been unreasonable. Under the statute, a qualified veteran—whether handicapped or non-handicapped, alcoholic or non-alcoholic—has ten years from the date of his discharge to utilize the G.I. Bill educational benefits. 38 U.S.C. 1662(a)(1). Persons in petitioners' circumstances therefore had some meaningful access to the educational benefit program. Cf. *Alexander v. Choate*, 469 U.S. at 301-306 (Rehabilitation Act is not violated by state Medicaid rule that had disparate impact on the handicapped). Moreover, eligible persons affected by alcoholism have available to them, during the delimiting period and thereafter, medical and rehabilitative services provided by the VA. 38 U.S.C. 1610. Even persons such as petitioners, if they are pursuing a full-time educational program when their delimiting period ends and if their request for an extension is denied, remain eligible for VA educational loans after the delimiting date (38 U.S.C. 1662(a)(2)(A)). In these circumstances, Congress might well conclude that ten years is time enough for a veteran to resolve a drug or alcohol problem—that it would be inappropriate, and would indeed communicate the wrong incentives, to tell veterans that there is no time limit on how long the VA will wait for them to resolve their problems and proceed with their publicly-funded education.

Just as this Court has concluded that conduct induced by alcoholism may be subject to deterrence through criminal sanctions, despite medical opinion labelling alcohol-

ism a "disease" (*Powell v. Texas, supra*), so too is it permissible for Congress to decide that the "disease" label does not require that alcoholism be categorized for all purposes with other disabilities less likely to involve elements of volition. Medical concepts developed in the context of diagnosis and treatment do not control the administrative decision of how best to interpret and further the purposes of the veterans' benefit statute (see note 14, *supra*).<sup>28</sup>

Moreover, even those medical writers who label alcoholism a "disease" for purposes of diagnosis and treatment, perceive that the label embraces a range of conditions including some in which volition plays a significant role that may be affected by appropriate incentives.<sup>29</sup> Even proponents of the "disease" concept recognize that an alcoholic may be able to exercise control over the amount he drinks, depending on the individual and on

<sup>28</sup> The medical community has found it useful to apply the "disease" label to alcoholism for reasons that have nothing to do with the administration of a benefits program. See Fingarette, *The Perils of Powell: In Search of a Factual Foundation for the "Disease Concept of Alcoholism,"* 83 Harv. L. Rev. 793, 809-812 (1970). One researcher has summarized these reasons (Blume, *Public Policy Issues, supra*, at 186-187):

Acceptance of alcoholism as a disease is the basis for public policies promoting early intervention; treatment; third-party coverage, such as public and private health insurance; services for families of alcoholic persons, with or without the participation of the alcoholic member; prevention services for children of alcoholic parents; and wide-ranging research into the biology, epidemiology, psychology, and sociology of alcoholism.

<sup>29</sup> See note 21, *supra*. "[M]any authorities flatly oppose [the 'loss of control'] orientation, and, while recognizing that there may be physical factors at work, consider it essential that 'there is a whole series of voluntary actions in the act of drinking; and there has to be a choice involved.'" Fingarette, *supra*, 83 Harv. L. Rev. at 808 n.66; see DSM-III at 169 (diagnostic criteria for alcohol abuse include "continuation of drinking despite a serious physical disorder that the individual knows is exacerbated by alcohol use").



the professional or other support he or she receives.<sup>30</sup> Indeed, even the view expressed by some medical commentators, that alcoholism represents a physical condition, either inherited or acquired, does not negate an

<sup>30</sup> A survey of the literature in 1970 concluded that even authorities "who use 'loss of control' language ultimately introduce serious qualifications. \* \* \* [W]e are told not that the alcoholic has no control of his drinking, but that he has greater or lesser control, widely varying in degree according to the circumstances and the individual." Fingarette, *supra*, 83 Harv. L. Rev. at 802 (emphasis in original). More recent authority, cited in this case as supporting the "disease" concept, bears out this description. Thus, one writer states (Wolf, *Alcohol and Health: The Wages of Excessive Drinking*, in *Alcoholism and Related Problems: Issues for the American Public* 29 (1984), cited by amicus National Association of Addiction Treatment Providers (Br. 11 n.6)):

There has been much dispute, but no consensus, about the various parts played by genetic inheritance, the social pressures, special features of individual growth and maturation, and the insidious effects of ethanol itself in the cause of alcoholism. Apparently, all are pertinent, and the behavioral characteristics of alcoholics are partly innate and partly shaped by learning or practice.

See also S. Zimberg, *supra*, at 8:

Alcoholism can best be considered a disease with a multiple causality. The factors believed to contribute to the development of alcoholism are both psychological and sociocultural, along with physiological factors which probably operate on a genetic basis.

The "disease" approach to alcoholism has itself been substantially revised (Kissin & Hanson, *The Bio-psycho-social Perspective in Alcoholism*, in *Alcoholism and Clinical Psychiatry* 12 (J. Solomon ed. 1982) (footnote omitted)):

In the old disease concept of alcoholism as promulgated [by] Jellinek and expanded upon by both psychoanalysis and Alcoholics Anonymous, the alcoholic was seen as more or less preordained to become alcoholic and to remain quintessentially alcoholic even after he became abstinent. \* \* \* [T]he old disease concept of alcoholism has largely been discarded.

In the new approach to the disease concept a variety of influences—physiological, psychological, and social—are seen as contributing to the development of problem drinking \* \* \*.

element of volition: "'physical' hypotheses do not claim that there is no volition in the alcoholic's excess drinking but that, partly because of physical abnormality, the alcoholic is one who faces a choice which is (increasingly) more difficult than for most people." Fingarette, *The Perils of Powell: In Search of a Factual Foundation for the "Disease Concept of Alcoholism,"* 83 Harv. L. Rev. 793, 805 (1970).<sup>31</sup>

Petitioners and the amici criticize the court of appeals' decision in *McKelvey* for separating the conduct of an alcoholic from his underlying condition, allowing the VA to label the conduct of excessive drinking as "willful misconduct." In fact, however, this approach coincides with a widely used and frequently successful approach to the treatment of alcoholics (Fingarette, *supra*, 83 Harv. L. Rev. at 807 n.64):

Alcoholics Anonymous maintains that alcoholism is a "disease," but not that drinking is involuntary. On the contrary, the entire approach in Alcoholics Anonymous is to enlist the voluntary cooperation of the alcoholic, to appeal to him on moral-religious-pragmatic grounds to voluntarily abstain

<sup>31</sup> The studies cited by amici to support the genetic component of alcoholism concede that the genetically-predisposed alcoholic retains volition in the sense of being susceptible to outside authorities telling him he should not drink (Bohman, *et al.*, *Maternal Inheritance of Alcohol Abuse: Cross-Fostering Analysis of Adopted Women*, 38 Arch. Gen. Psychiatry 965 (1981), cited by Amicus National Council on Alcoholism, Inc. (Br. 25 n.13); see Cloninger, *supra*, at 867):

[T]he critical importance of sociocultural influences in most alcoholics suggest that major changes in social attitudes about drinking styles can change dramatically the prevalence of alcohol abuse regardless of genetic predisposition.

The most recent study cited by the amici also states that even among genetically predisposed individuals, "personal values and intentions" play a role in excessive drinking. Peele, *The Implications and Limitations of Genetic Models of Alcoholism and Other Addictions*, 47 J. Studies on Alcohol 63 (1986).

from drinking, and to engage in reciprocal self-help along these lines with his brother AA members.<sup>[32]</sup>

This approach is also compatible with recent studies, which stress that the "disease" concept of alcoholism is perfectly consistent with an insistence that the alcoholic assume responsibility for his or her own conduct (G. Vaillant, *supra*, at 299):<sup>33</sup>

In conveying the concept that alcoholism is a disease to the patient, it is important also to underscore that alcoholism is a disease that is highly treatable,

<sup>32</sup> The AA treatment has also been described as a way of "transform[ing] externalization of responsibility into self-responsibility." G. Vaillant, *supra*, at 204; see S. Zimberg, *supra*, at 118 ("The only requirement for AA membership is a desire to stop drinking.").

"There is no longer any question that Alcoholics Anonymous has been responsible for the sobriety of more alcoholics than any other method, social, religious, or medical. Psychiatrists are now "believers."'" M. Hayman, *Alcoholism—Mechanism & Management* 174-175 (1966), quoted in Fingarette, *supra*, 83 Harv. L. Rev. at 807 n.64. One of the studies cited by amici acknowledges that while the data are inconclusive, AA treatment as well as "personal resolve" has helped cure many alcoholics (West, *Alcoholism and Related Problems: An Overview*, in *Alcoholism and Related Problems: Issues for the American Public* 17 (1984)):

AA is known to have helped hundreds of thousands of alcoholics to maintain sobriety. Other alcoholics, even without the help of AA, have also been able to remain sober through personal resolve reinforced by family support, religious conversion experiences, psychotherapeutic intervention, and effective contact with medical facilities and health personnel.

<sup>33</sup> The role of self-responsibility in the cure of alcoholism is also stressed in S. Zimberg, *supra*, at 67-69:

The patient should be told that the therapist, the patient's spouse, or anyone else cannot stop a problem drinker from drinking. Only the patient's own efforts, utilizing the treatment tools, will result in a recovery from the problem drinking.

\* \* \* \* \*

The patient's recovery ultimately depends on his weighing the benefits of sobriety against the "benefits" of drinking. Only the patient can make this determination.

but that like the treatment of diabetes, treatment of alcoholism will require great responsibility from the patient.

Even ardent advocates of the "disease" concept recognize that a person with the genetic predisposition to alcoholism may exercise personal responsibility and choose not to drink (Talbot, *Alcoholism and Other Drug Addictions: A Primary Disease Entity*, 75 J. Med. Ass'n Ga. 490, 493 (1986), cited by amici American Medical Association, *et al.* (Br. 13 n.7)):

There are millions of people in this country who have the genetic predisposition, but who for cultural, health, personal, or religious reasons will not abuse, so they never manifest the disease.

In sum, Congress decided to apply a "willfulness" test to the participation of alcoholics in veterans' benefits programs. That decision is consistent with medical authority, which recognizes that many alcoholics are not completely helpless but retain a significant degree of volition. In its regulations and policies implementing the statute, the VA has acted reasonably in focusing the "willfulness" determination on the presence or absence of an underlying psychiatric disorder or a derivative organic disorder. The VA's approach—which Congress has endorsed—makes a reasonable distinction among types of handicaps, based on the "willfulness" test and substantial medical authority. It is therefore perfectly consistent with the Rehabilitation Act.<sup>34</sup>

<sup>34</sup> This Court's decision in *School Bd. of Nassau County v. Arline*, *supra*, does not require the conclusion that the Rehabilitation Act prevents the VA from carrying out the "willful misconduct" test for G.I. Bill extensions and disability pensions imposed by the veterans' benefits statute. The Court's opinion in *Arline* concluded (slip op. 9) that the purpose of the Rehabilitation Act is to assure that handicapped individuals are not denied benefits because of "prejudiced attitudes or \* \* \* ignorance" or "society's accumulated myths and fears" (*ibid.*). In this case, unlike *Arline*, the VA is implementing a specific congressional decision to utilize a "willful

## CONCLUSION

The judgments of the courts of appeals should be affirmed.

Respectfully submitted.

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misconduct" standard; and it has done so in a manner that accepts psychiatric testimony in individual cases to determine whether a psychiatric disorder is involved in the particular case. Thus, the reconciliation here of the Rehabilitation Act with a more specific congressional directive—a matter not addressed in *Arline*—is fully consistent with the Court's rationale in that case.

## APPENDIX

38 U.S.C. 211(a) provides:

On and after October 17, 1940, except as provided in sections 775, 784, and as to matters arising under chapter 37 of this title, the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

Section 203 of the G.I. Bill Improvement Act of 1977, Pub. L. No. 95-202, Tit. II, 91 Stat. 1439, 38 U.S.C. (Supp. II 1978) 1662 provided, in pertinent part:

(a) (1) No educational assistance shall be afforded an eligible veteran under this chapter beyond the date 10 years after the veteran's last discharge or release from active duty after January 31, 1955; except that, in the case of any eligible veteran who was prevented from initiating or completing such veteran's chosen program of education within such time period because of a physical or mental disability which was not the result of such veteran's own willful misconduct, such veteran shall, upon application, be granted an extension of the applicable delimiting period for such length of time as the Administrator determines, from the evidence, that such veteran was prevented from initiating or completing such program of education.

\* \* \* \* \*

(e) No educational assistance shall be afforded any eligible veteran under this chapter or chapter 36 of this title after December 31, 1989.

(1a)



38 C.F.R. 3.301(c) (2) provides:

*Alcoholism.* The simple drinking of alcoholic beverage is not of itself willful misconduct. The deliberate drinking of a known poisonous substance or under conditions which would raise a presumption to that effect will be considered willful misconduct. If, in the drinking of a beverage to enjoy its intoxicating effects, intoxication results approximately and immediately in disability or death, the disability or death will be considered the result of the person's willful misconduct. Organic diseases and disabilities which are a secondary result of the chronic use of alcohol as a beverage, whether out of compulsion or otherwise, will not be considered of willful misconduct origin.

Veterans Administration Manual M21-1 provides:

50.40 DISABILITY OR DEATH FROM USE OF ALCOHOL

a. *Alcohol Per Se.* Alcoholism, in and of itself, is a misconduct situation.

(1) As a primary condition, it may not be accepted as a basis for granting or increasing monetary benefits under the laws administered by the VA. However, if alcoholism is secondary to and a manifestation of a psychotic, psychoneurotic or psychophysiologic disorder, consider the alcoholism part and parcel of the disability and rate as one disease entity, e.g., schizophrenia with alcoholism.

**REPLY**

**BRIEF**

NOV 27 1987

JOSEPH F. SPANIOL, JR.  
CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1987

EUGENE TRAYNOR,

*Petitioner,*

v.

THOMAS K. TURNAGE, ADMINISTRATOR OF VETERANS' AFFAIRS,  
and VETERANS' ADMINISTRATION,

*Respondents.*

JAMES P. MCKELVEY,

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*Respondents.*

**On Writs of Certiorari to the United States  
Courts of Appeals for the Second Circuit and the  
District of Columbia Circuit**

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—  
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Courts of Appeals for the Second Circuit and the  
District of Columbia Circuit**  
—

**REPLY BRIEF FOR PETITIONERS**

Petitioners Eugene Traynor and James P. McKelvey submit this brief in reply to the arguments advanced by respondents. The government argues that 38 U.S.C. § 211(a) (1982) precludes the federal courts from considering whether the Veterans' Administration's "willful misconduct" regulation discriminates



against the handicapped in violation of § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982). The United States also argues that even if § 211(a) does not bar review, the willful misconduct regulation is not discriminatory.

These arguments should be rejected, for the reasons set forth below and in petitioners' opening brief.

**I. SECTION 211(a) DOES NOT PRECLUDE THE FEDERAL COURTS FROM DETERMINING WHETHER THE VETERANS' ADMINISTRATION'S WILLFUL MISCONDUCT REGULATION VIOLATES § 504 OF THE REHABILITATION ACT**

**A. Neither The Language Of § 211(a) Nor The Legislative History Supports The Government's Argument**

**1. The Language of § 211(a) Permits Review**

The government asserts that the plain language of § 211(a) precludes judicial review of petitioners' challenge under the Rehabilitation Act to a Veterans' Administration ("VA") regulation of broad and binding application.<sup>1</sup> Res. Br. at 12-13. It relies for this conclusion upon a cursory reading of § 211(a).<sup>2</sup> In

<sup>1</sup> The government repeatedly errs in characterizing petitioners' lawsuits as mere disputes about the VA's determination of individual benefit claims. In fact, petitioners are seeking review of the VA's failure—and, indeed, refusal—to comply with a federal statute, the applicability of which is undisputed.

<sup>2</sup> The government's reliance on *Lindahl v. OPM*, 470 U.S. 768 (1985), is misplaced. Res. Br. at 13. In *Lindahl*, the Court noted that "when Congress intends to bar judicial review altogether, it typically employs language far more unambiguous and comprehensive than" the language of the statute in question in *Lindahl*, citing § 211(a) as an example of a statute with a clearer bar to review. *Id.* at 779-780. At most, this citation stands for the proposition that § 211(a) is broader than the statute at issue

contrast, petitioners have explained how a full and fair reading of the statutory language permits review in these circumstances. See Pet. Br. at 34-37.

Section 211(a) provides that "decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans . . . shall be final and conclusive." (Emphasis added.) Thus, review is barred only where a court would be required to substitute its own judgment for the VA's concerning questions of law or fact that arise under any law (1) administered by the VA that (2) provides benefits for veterans. Petitioners' lawsuits plainly are outside this bar.

First, as noted by Judge Kearse in her dissent in *Traynor*, the VA does not administer § 504 of the Rehabilitation Act. See Pet. Br. at 35 n.23.<sup>3</sup> Moreover, § 504 does not provide benefits to veterans—rather, it prohibits discriminatory treatment of the handicapped, including alcoholics, in all federal programs, not just those of the VA.<sup>4</sup>

in *Lindahl*, and that § 211(a) bars review in certain circumstances. Petitioners have never claimed otherwise. The Court's decision in *Johnson v. Robison*, 415 U.S. 361 (1974), and four court of appeals decisions allowing review of non-constitutional challenges to VA determinations confirm that § 211(a) does not bar review in all circumstances. See Pet. Br. at 46 & n.31.

<sup>3</sup> The Justice Department administers the Rehabilitation Act pursuant to Executive Order No. 12,250, reprinted in 42 U.S.C. § 2000d-1 (1982).

<sup>4</sup> If the government's view of § 211(a) were accepted, § 211(a) would preclude review of any VA regulation, regardless of its inconsistency with federal laws of general applicability. For example, § 211(a) would bar courts from reviewing claims of mi-

The government contends, however, that many veterans claiming a "disability" under a veterans' benefits statute could also claim to be "handicapped" under the Rehabilitation Act. As a result, the government argues that a ruling in petitioners' favor would allow any veteran to avoid the effect of § 211(a) merely by including a Rehabilitation Act claim in his or her complaint. Res. Br. at 23-24.

This concern is frivolous. The Court noted in *Johnson v. Robison* that § 211(a) precludes review of decisions "made by the Administrator in the . . . application of a particular provision of the [veterans' benefits] statute to a particular set of facts." 415 U.S. at 367. If a complaint alleging violation of a non-VA statute actually questions only the VA's application of the laws and regulations it administers to a particular set of facts, a decision in favor of petitioners would not authorize judicial review. But where, as here, the challenge is to the VA's failure or refusal to comply with a statute of general applicability, thus raising a genuine issue under a statute not administered by the VA, review would and should be permitted. Once that legal challenge is resolved, it would be for the VA to apply the corrected policy on a case-by-case basis in light of the facts raised by each veteran's case.

## 2. The Available Evidence of Congressional Intent Supports Judicial Review

The government also contends that the legislative history of § 211(a) supports its argument that the courts cannot hear these cases. Yet the "legislative history" cited by the government, principally a reci-

ample, § 211(a) would bar courts from reviewing claims of minority veterans that VA regulations violate Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1982).

tation of the language of § 211(a) in its various iterations, is unilluminating. The language of the statute has changed over the years, but it has never supported the government's sweeping assertion that Congress intended to bar review even of "questions arising under other statutes [than those administered by the VA]." Res. Br. at 14. Bars to judicial review are disfavored. See, e.g., *Bowen v. Michigan Academy of Family Physicians*, 106 S.Ct. 2133, 2135-36 (1986). Accordingly, if the government's position were correct, one would find support in the history of § 211(a) for the proposition that VA regulations are not subject to review to determine whether they violate laws of general applicability.<sup>5</sup>

Instead, what little legislative history exists supports judicial review. Pet. Br. at 39-45. The VA's own pronouncements have been particularly instructive. The VA Administrator told the Congress in 1984: "VA regulations should be, and are, reviewable in the

<sup>5</sup> In *Gott v. Walters*, 756 F.2d 902, 908 (D.C. Cir.), *vacated and remanded with order to dismiss*, 791 F.2d 172 (D.C. Cir. 1985) (en banc), Judge Scalia noted that "the language [of 211(a)] dates back to . . . an era in which the adoption of principles governing adjudication *by rule* was rare (and thus unlikely to be specifically addressed in such a statute)." Given this, Congress could hardly have intended to preclude the review of regulations when it enacted § 211(a).

A recent commentator, arguing that review should be permitted in these cases, has noted that § 211(a) was enacted at a time when state-created benefits were viewed as mere "gratuities," not property rights. As such, veterans' benefits could be withdrawn without due process of law. See Reisch, "211 in Progress: Must the Veterans Administration Comply with Federal Law," 40 *Stanford L. Rev.* at 323, 324-25 (1987) (student author) (discussing scope of § 211(a) bar to review).



Federal courts." See Pet. Br. at 43. The government discounts this testimony as merely "snippets of subsequent legislative materials" that should be given no weight. Res. Br. at 18 n.8. However, the Court has repeatedly recognized that the view of the affected agency is a significant source for understanding Congressional intent.<sup>6</sup> See, e.g., *Bell v. New Jersey*, 461 U.S. 773, 787 (1983); *Andrus v. Shell Oil Co.*, 446 U.S. 657, 666 n.8, 667-672 (1980). This is particularly true here, where the agency told Congress that review of regulations was available, and Congress relied on the VA's statements in declining to amend § 211(a).<sup>7</sup> The VA's stated views to Congress should therefore be accorded significant weight in resolving these issues. See Pet. Br. at 43-45.

**B. Judicial Review Furthers The Goals Of The Rehabilitation Act And Will Not Thwart The Objectives Of § 211(a)**

**1. Review Is Necessary To Ensure That The Requirements Of § 504 Are Honored**

The underlying premise of the government's argument is that the VA is competent to review its own actions under the Rehabilitation Act and other

<sup>6</sup> The government recognizes this point, for it argues that the VA Administrator's view concerning the legality of the willful misconduct regulation is entitled to "considerable deference." Res. Br. at 32. See note 16 *infra*.

<sup>7</sup> See Reisch, *supra*, 40 Stanford L. Rev. at 351 & nn.149-150. Despite its conciliatory statements to Congress that § 211(a) permits review of regulations, the VA has argued the jurisdictional issue inconsistently to the Courts of Appeals. See Pet. Br. at 9 and 12-13 (jurisdiction challenged in *Traynor* but initially conceded in *McKelvey*); *Tinch v. Walters*, 765 F.2d 599 (6th Cir. 1985) (jurisdiction not challenged).

generally-applicable federal statutes, and that § 211(a) withdraws from the federal courts the authority to determine whether a VA regulation violates such statutes. This is an astonishing argument in light of the facts of these cases.

In *Traynor*, the Board of Veterans Appeals explicitly declined to consider whether its decision on Mr. Traynor's request for benefits was proper in light of § 504 of the Rehabilitation Act. 791 F.2d at 233 (*Traynor* Cert. Pet. 35A-36A); see Pet. Br. at 32. In *McKelvey*, raising the Rehabilitation Act issue before the Board of Veterans Appeals would have been futile. As the government stated in its opening brief to the D.C. Circuit on Mr. McKelvey's appeal,

"We are not pursuing the question of jurisdiction on this appeal, because we do not believe that 38 U.S.C. § 211(a) can be applied to the claim under the Rehabilitation Act . . . . We do not read 38 U.S.C. § 211(a) to preclude judicial review of a point that the Veterans Administration never considered and, under existing regulations, probably had no authority to consider."

See Pet. Br. at 32-33.

Thus, petitioners never had a hearing before the VA on the question of whether the willful misconduct regulation violates § 504 of the Rehabilitation Act. The Board of Veterans Appeals believed it had no authority to provide such a hearing, and until quite late in the *McKelvey* litigation, the United States concurred. Under these circumstances, divesting the courts of jurisdiction would exempt the VA from the



rule of law and leave petitioners without any forum to raise their civil rights claims.<sup>8</sup>

## 2. Judicial Review Will Not Impair The Uniformity Of VA Decisions

The government contends that reversal of the decisions below would foster inconsistency by allowing judicial review of policy interpretations announced by regulation but not those announced through adjudication. Res. Br. at 21-22. This contention has no merit. The VA develops very little policy by adjudication. VA regulations state explicitly that "[c]onclusions reached in individual cases . . . will not be followed as precedents." 38 C.F.R. § 3.101 (1986). Instead, VA benefits determinations are guided by regulations and policy manuals that reiterate and implement the requirements of those regulations. *See, e.g.*, VA Manual M21-1, § 14.04 (JA at 167). Thus, allowing review here produces a rational scheme for ensuring VA compliance with generally-applicable law.<sup>9</sup>

<sup>8</sup> It is one thing to trust that an agency's case-by-case determinations will comply with agency rules, but it is quite another to give an agency unreviewable discretion to issue or maintain rules that are facially inconsistent with laws passed by Congress. The latter position—urged by the government here—undermines the rule of law by authorizing agencies to disregard with complete impunity their obligations under federal statutes.

<sup>9</sup> The government notes the First Circuit's apparent concern in *Paluca v. Secretary of Labor*, 813 F.2d 524 (1st Cir. 1987), that permitting review of generally-applicable regulations but not individual cases would produce an "absurd result" because the court could not ensure that its directive was followed in individual cases. *See* Res. Br. at 22 n.12. This is unpersuasive, and it fails to justify the abdication of the court's responsibility to

Equally meritless is the government's contention that allowing review of regulations would have the negative effect of encouraging the VA to avoid rule-making altogether. Res. Br. at 22. There has been no evidence of such a trend despite the fact that review has been available in several circuits for a number of years. Moreover, the incentives for the VA to continue to operate through regulations will remain strong despite the availability of judicial review in the narrow circumstances of these cases.<sup>10</sup>

## 3. Judicial Review Will Not Overburden the Courts

The government asserts, without justification, that a decision allowing review would overburden the courts with litigation. It supports this policy argument only by counting the number of pages of VA regulations in the Code of Federal Regulations. Res. Br. at 19-21. This concern is not only speculative, but also must be rejected on the basis of the VA's own

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ensure that general rules governing individual cases are legally correct.

<sup>10</sup> The government quotes from this Court's decision in *Rose v. Rose*, 107 S.Ct. 2029 (1987), to support its argument that permitting review would result in non-uniform VA decisions. In fact, *Rose* supports petitioners' argument. *Rose* held that § 211(a) did not divest a state court of jurisdiction in a contempt proceeding brought against a veteran charged with failing to make child support payments out of the proceeds of his VA disability benefits. The Court stated that the "interest in uniform administration of veterans' benefits focuses . . . on the technical interpretations of the statutes granting entitlements, particularly on the definitions and degrees of recognized disabilities and the application of the graduated benefit schedules." *Id.* at 2035. These cases ask the Court to consider the legality of a broad and binding regulation having nothing to do with technical VA determinations.

experience. Although challenges by veterans to VA regulations have been permitted for a number of years in four circuits, only a handful of cases have been brought. *See* Pet. Br. at 46 n.32. This is hardly an overwhelming burden for the courts, and a decision by the Court in petitioners' favor will not open the floodgates.<sup>11</sup>

## II. THE WILLFUL MISCONDUCT REGULATION VIOLATES § 504 OF THE REHABILITATION ACT

### A. Section 504 Of The Rehabilitation Act Prohibits Discrimination On The Basis Of Alcoholism

The government contends that, under petitioners' theory, "the dispositive issue in the case is whether alcoholism is a disease." Res. Br. at 26. This is simply incorrect. The dispositive issue is whether the VA may ignore Congress' determination that alcoholism is a handicap,<sup>12</sup> and its mandate that alcoholics must not be the victims of discrimination because of their handicap. Thus, the issue is not a medical one—whether alcoholism is a "disease"—but a legal one: may the VA ignore federal law and treat alcoholics in a manner prohibited by the Congress. The answer is obviously no, and a straightforward analysis under § 504 of the Rehabilitation Act demands the conclusion that the willful misconduct regulation is improperly discriminatory.

<sup>11</sup> *See* Reisch, *supra*, 40 Stanford L. Rev. at 352-355.

<sup>12</sup> In addition to its determination that alcoholism is a handicap, Congress has also determined that "alcoholism is an illness requiring treatment and rehabilitation." Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970, 42 U.S.C. § 4541(a)(8) (1982).

As the government concedes, alcoholism is a handicap for purposes of the Rehabilitation Act.<sup>13</sup> *See* Res. Br. at 33; *see also* Pet. Br. at 20-21. Accordingly, the Court must consider (1) whether petitioners are "otherwise qualified" for the program of benefits from which they have been excluded (the government does not dispute this); (2) whether petitioners have been excluded "solely" because of their handicap (the government admits that petitioners, and all veterans whose only disability is alcoholism, are barred from receiving delimiting date extensions solely because they are alcoholics); and (3) whether the program from which petitioners have been excluded is subject to § 504 (the government concedes this). Res. Br. at 36-37. In sum, the government has not challenged any element of petitioners' § 504 claims. Therefore petitioners must prevail.

### B. Attempts To Justify The Willful Misconduct Regulation Are Neither Relevant Nor Persuasive

The government makes a number of unpersuasive arguments in an effort to justify its discriminatory regulation. Petitioners will briefly discuss the reasons why these arguments should be rejected.

#### 1. The Willful Misconduct Regulation, Which Is Rooted In The Era Of Prohibition, Violates The Basic Mandate Of The Rehabilitation Act

The government argues that the VA's classification of alcoholism as willful misconduct is long-standing

<sup>13</sup> The VA distinguishes primary alcoholism, which is not accompanied by an underlying psychiatric condition, from secondary alcoholism, which is, by denying delimiting date extensions only to primary alcoholics. Because the Rehabilitation Act recognizes all alcoholism, whether primary or secondary, as a handicap, petitioners need not address the VA's misuse of these distinctions. *See* note 16 *infra*.



and therefore entitled to deference. Res. Br. at 27-30. Petitioners concede that the "willful misconduct" regulation has a long history; indeed, the archaic attitude toward alcoholism that it reflects is precisely the problem. The regulation's conclusive classification of alcoholism as willful misconduct dates from the era of Prohibition, when little was known about the nature of alcoholism, and when alcoholism was considered merely immoral behavior and a sign of weakness.

With the passage of the Rehabilitation Act in 1973, Congress determined that persons with handicaps should not be discriminated against "because of the prejudiced attitudes or the ignorance of others." *School Board of Nassau County v. Arline*, 107 S.Ct. 1123, 1129 (1987). The central purpose of the Act is to ensure that decisions about handicapped individuals, including alcoholics, will be made not on the basis of stereotypes and conclusive presumptions—such as those reflected in the VA's "willful misconduct" regulation—but on the basis of a careful, individualized assessment of relevant information about each person's handicap and qualifications to participate in the program in question. As the Court noted in *Arline*, "[t]he Act is carefully structured to replace . . . reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments." *Id.* at 1129.

The willful misconduct regulation defeats this purpose by requiring that all decisions about veterans whose handicap is alcoholism be based on the conclusive presumption that alcoholism is caused by misconduct—a presumption that, as amici point out, flies in the face of current medical knowledge about the etiology and nature of this illness. The regulation bars

all veterans handicapped by alcoholism from making any showing that their handicap was not caused by misconduct, and thus preemptorily denies them extensions of time in which to use their educational benefits.

The government disingenuously asserts, however, that in amending 38 U.S.C. § 1662(a)(1) (1982) in 1977 to allow extensions of time in which to use educational benefits, Congress approved of the VA's long-standing interpretation of alcoholism as willful misconduct. Res. Br. at 30-31. Its only support for this conclusion is language from a Senate Committee report suggesting that, in determining whether a disability resulted from "willful misconduct," the "same standards [should] be applied as are utilized in determining eligibility for other VA programs."

There is no indication, however, that the Committee or the Congress considered the substance of the VA's regulations.<sup>14</sup> This is particularly significant here because in 1977, the time of the amendments on which the government relies, § 504 of the Rehabilitation Act *did not apply* to the VA educational benefits program. Section 504 only became applicable in 1978, when Congress first extended the proscription against discrimination to all federal agencies, without any indication that the VA educational benefits program

<sup>14</sup> The government calls the issue of alcoholism "technical and complex," and suggests that the VA has expertise in the area. Res. Br. at 31. This "expertise" is not explained, and the record is utterly barren of any indication that the VA exercised any medical or other technical judgment in deciding that alcoholism is willful misconduct. Indeed, the effect of the willful misconduct regulation was to preclude the use of any such expertise on the part of the VA in these cases.



should be immune from the full impact of § 504. The government's suggestion that a brief reference in a Senate Committee report made when § 504 did not even apply mandates disparate treatment for a particular category of handicapped individuals is absurd.

## 2. Enforcing § 504 Will Not Repeal The Statute Permitting Extensions Of Delimiting Dates

The government suggests that reversal of the decisions below will impliedly repeal the statutory provision permitting extensions of time in which to use VA educational benefits. Res. Br. at 32-35. The government reaches this conclusion by acting as if the willful misconduct *regulation* is in fact synonymous with the delimiting date extension *statute*, and by attempting to create a conflict between two statutes when there is none. Res. Br. at 32. This effort must fail.

The willful misconduct regulation discriminates against alcoholics in violation of § 504 of the Rehabilitation Act. Judicial recognition of the regulation's unlawfulness would have absolutely no effect on the *statute* authorizing extensions only for veterans whose disabilities are not the result of willful misconduct. The VA would still be able to make individualized determinations of willful misconduct under the statute; it simply could not make blanket determinations that a handicapping condition such as alcoholism is *per se* willful misconduct.<sup>15</sup>

<sup>15</sup> The D.C. Circuit in *McKelvey* suggested that the VA could create an irrebuttable presumption that alcoholism is "willful misconduct," stating that "[i]t is no discrimination . . . to establish for various disabilities the sorts of procedures that are distinctively appropriate." 792 F.2d at 203. But the willful mis-

The government suggests, however, that its regulation is merely a way of "making reasonable distinctions among types of handicaps." Res. Br. at 33. Thus, respondents argue that "even if one accepts the disease conception of alcoholism and considers only those veterans whose alcoholism is disabling, that would not necessarily preclude scrutiny of the veteran's conduct or his volition as a contributing cause of his disability." *Id.* This general statement has no conceivable relevance to the VA's classification of alcoholics. These cases demonstrate that the VA does not scrutinize an alcoholic veteran's conduct or volition. Instead, once a veteran is identified as an alcoholic, that ends the inquiry. Alcoholic—and thus—handicapped veterans are presumed conclusively to have engaged in willful misconduct, and are denied access to educational benefits because of their condition. This is nothing more than impermissible discrimination on the basis of handicap.<sup>16</sup>

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conduct regulation is substantive, not procedural, and determines conclusively that persons handicapped by alcoholism have engaged in willful misconduct, regardless of whether this presumption is factually incorrect in an individual case. This presumption, no matter how explained or rationalized, is discriminatory.

<sup>16</sup> The VA's attempt to rationalize the willful misconduct regulation must be rejected, for several reasons. First, "[i]t is an axiom of administrative law that an agency's explanation of the basis for its decision must include 'a rational connection between the facts found and the choice made.'" *Bowen v. American Hospital Ass'n*, 106 S.Ct. 2101, 2112 (1986). The briefs of amici demonstrate that the VA's classification is not medically sound, and therefore the regulation is irrational. Second, there is no reason to accord any deference to the VA's proffered rationale. In *Bowen* the Court noted that the views of most federal agencies with respect to § 504 are not "predicated on expertise,"

The government nevertheless contends that such discrimination is acceptable because of legislative events occurring after 1978, all of which reflect widespread dissatisfaction with the VA's position here and concern about whether that position was supported by law. In 1980, in deciding not to adopt a statutory provision that would have specifically overridden the VA's regulation in the circumstances raised by these cases, the Joint Explanatory Statement of the House and Senate Veterans Affairs Committees noted:

By deleting the Senate provision [which would have made clear that delimiting date extensions were available to recovered alcoholics], the Committees are taking no position as to whether such a provision is necessary in order to authorize the VA to make favorable determinations regarding GI Bill delimiting date extensions based on disability in the cases of veterans or eligible persons who have recovered from alcohol or drug dependence or abuse disabilities.

Veterans Rehabilitation and Education Amendments of 1980, Joint Explanatory Statement, [1980] U.S. Code Cong. & Ad. News 4617, 4635. This statement is striking, for it indicates that the Committees believed that no revision of the statutory willful misconduct test was necessary to allow the VA to grant extensions to veterans handicapped by alcoholism.

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and thus not entitled to deference. 106 S.Ct. at 2120 n.30. Finally, § 504 demands not just a reasonable basis for discriminatory regulations, but a "*substantial* showing that [an agency's] regulations are justified." *Traynor v. Walters*, 606 F. Supp. 391, 400 (S.D.N.Y. 1985) (emphasis added); see also *Brief Amicus Curiae of The National Council on Alcoholism* at 43 n.23.

### 3. Enforcing § 504 Will Not Have Adverse Consequences For The Administration of VA Programs

The government states that "in assessing the reasonableness of the VA's interpretation of 'willful misconduct,' it is . . . necessary to consider the consequences of that interpretation" in the context not only of educational benefits extensions but also of disability pensions. Res. Br. at 40-41. This explicit invitation to consider policy issues properly left to Congress, even if it were proper, has no merit.

The government suggests that the availability of extensions would create an incentive for alcoholic veterans to continue drinking. This argument defies common sense. In any event, the amount of educational benefits is determined not by the level of disability but by the length of service. 38 U.S.C. § 1661(a) (1982). Continued drinking would have no effect on the amount of benefits.

The financial incentives may be different with respect to disability benefits, but that program, which is subject to a separate VA regulatory regime, is not at issue here. Moreover, the government's concern is misplaced, for if a veteran continued to drink in order to receive or enhance disability benefits, that might properly be classified as "willful misconduct" that would allow the denial of benefits. In any event, if a decision for petitioners were perceived to have an adverse impact on the disability benefit program, Congress could act to correct that impact, much as it limited the effect of § 504 of the Rehabilitation Act in the context of employment of active alcoholics and drug abusers. 29 U.S.C. § 706(8)(B) (1982).

CONCLUSION

For the reasons discussed in petitioners' opening brief and in this reply brief, the Court should reverse the decisions of the Second Circuit in *Traynor* and the D.C. Circuit in *McKelvey*, and invalidate the VA's willful misconduct regulation because it conflicts with § 504 of the Rehabilitation Act.

Respectfully submitted,

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November 25, 1987



**AMICUS CURIAE**

**BRIEF**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1986

EUGENE TRAYNOR,

*Petitioner,*

v.

THOMAS K. TURNAGE, ADMINISTRATOR  
OF VETERANS' AFFAIRS, and  
VETERANS' ADMINISTRATION,

*Respondents.*

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ON WRITS OF CERTIORARI TO THE UNITED STATES  
COURTS OF APPEALS FOR THE SECOND CIRCUIT AND  
THE DISTRICT OF COLUMBIA CIRCUIT

**BRIEF AMICUS CURIAE**  
**NATIONAL COUNCIL ON ALCOHOLISM, INC.**

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## TABLE OF AUTHORITIES

CASES:

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<u>Bentivegna v. U.S. Dept. of Labor,</u> 694 F.2d 619 (9th Cir. 1982)....	43
<u>McKelvey v. Walters,</u> 596 F.Supp. 1317 (D.D.C. 1984), <u>rev'd sub nom.</u> <u>McKelvey v. Turnage,</u> 792 F.2d 194 D.C. Cir. 1986), <u>cert. granted,</u> 55 U.S.L.W. 3607 (U.S. March 10, 1987) (No. 86-737).....	3, 27, 39, 42-45
<u>New York State Ass'n for Retarded</u> <u>Children v. Carey,</u> 612 F.2d 644 (2nd Cir. 1979).....	43
<u>Pushkin v. Regents of Univ. of Colorado,</u> 658 F.2d 1372 (10th Cir. 1981)..	43
<u>School Board of Nassau Co., Fla. v.</u> <u>Arline,</u> 107 S.Ct. 1123 (1987)...	9, 35, 36, 40, 42
<u>Shirey v. Devine,</u> 670 F.2d 1188 (D.C. Cir. 1982).....	43
<u>Strathie v. Dept. of Transportation,</u> 716 F.2d 227 (3rd Cir. 1983)....	43
<u>Traynor v. Walters,</u> 606 F.Supp. 391 (S.D.N.Y. 1985), <u>rev'd,</u> 791 F.2d 226 (2d Cir. 1986), <u>cert. granted,</u> 55 U.S.L.W. 3607 (U.S. March 10, 1987) (No. 86-622).....	3, 43

CONSTITUTION, STATUTES, and REGULATIONS:

Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970, Pub. L. 91-616, 84 Stat. 1848, 42 U.S.C. § 4541 (1982).....	7, 10, 28
Economy Act of 1933, Pub. L. No. 73-2 Title I, §§ 3, 4, 48 Stat. 8, 9 (1933).....	37
Rehabilitation Act of 1973, Pub L. No. 93-112, Title V, 87 Stat. 390 (1973), 29 U.S.C. §§ 791-794a Section 7(6), 29 U.S.C. § 706(7) [29 U.S.C.A. §706(8) (West Supp. 1987)].....	33, 40
Section 504, 29 U.S.C. § 794 (1982) [29 U.S.C.A. § 794 (West Supp. 1987)].....	5, <u>passim</u>
Rehabilitation, Comprehensive Services and Developmental Disabilities Amend- ments of 1978, Pub.L. No. 95-602, §§119, 122(a)(6), 92 Stat. 2982, 2984-5 (1978).....	33, 34
Veterans' Benefits Law 38 U.S.C. §1662(a)(1) (1982).....	4
38 C.F.R. §3.301(c)(2) (1985)... 4, 7, 38	
45 C.F.R. §85.31 (1985).....	32
42 Fed. Reg. 22,676-22,686 (1977).....	32, 40
43 Fed. Reg. 2132, 2134 (1978).....	32

Former Veterans' Regulation No. 10 (1933).....	37
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MISCELLANEOUS

124 Cong. Rec. S15,566-68 (daily ed. Sept. 20, 1978).....	29, 33
Exec. Order No. 11,914, 3 C.F.R. 117 (1977).....	32
43 Op. Att'y Gen. No. 12 (1977).....	31
S. Rep. No. 91-1069, 91st Cong., 2d Sess. 1, 3 (1970).....	29
S. Rep. No. 96-103, 96th Cong., 1st Sess. 3-4, 15, <u>reprinted in</u> 1979 U.S. Code Cong. & Ad. News, 2681, 2682-83, 2694.....	29

BOOKS AND ARTICLES

American Medical Association, <u>Manual on Alcoholism</u> (Chicago, 1957)...	11, 15
American Psychiatric Association, <u>Diagnostic and Statistical Manual of Mental Disorders-III</u> (APA, Washington, D.C. 1980).....	11
DSM-IIIR (1987).....	11
S. Blume, M.D., "The Disease Concept of Alcoholism, 1983", 5 <u>J. of Psychiat. Treatment and Evaluation</u> 471 (1983).....	6, 10

- M. Bohman, S. Sigvardsson & R. Cloninger, "Inheritance of Alcohol Abuse: Cross-Fostering Analysis of Alcoholic Men", 38 Arch. Gen. Psychiat. 861 (1981)..... 25
- M. Bohman, S. Sigvardsson & R. Cloninger, "Maternal Inheritance of Alcohol Abuse: Cross-Fostering Analysis of Adopted Women", 38 Arch. Gen. Psychiat. 965 (1981).. 25
- R. J. Cadoret, C.A. Cain, & W. Grove, "Development of Alcoholism in Adoptees Raised Apart from Biologic Parents," 37 Arch. Gen. Psychiat. 561 (1980)..... 24
- L. Carroll, Through the Looking Glass, reprinted in Alice in Wonderland and Other Favorites, (New York: Washington Square Press, 1951)... 6
- National Council on Alcoholism & American Medical Society on Alcoholism, "Definition of Alcoholism", 85 Annals of Internal Medicine No. 6 (1976)... 12
- M. A. Schuckit, M.D., "Genetic and Clinical Implications of Alcoholism and Affective Disorder," 143 Am. J. Psychiatry 140 (1986)....18, 22
- M. A. Schuckit, D. W. Goodwin & J. Winokur, "A Half-Sibling Study of Alcoholism", 128 Amer. J. Psychiat. 1132 (1972)..... 24

- U.S. Department of Health and Human Services, 6th Special Report on Alcohol and Health, (Washington, D.C. 1986)..... 10
- J. Winoker, T. Reich, J. Rimmer et al., "Alcoholism: III Diagnosis and Familial Psychiatric Illness in 259 Alcoholic Probands," 23 Arch. Gen. Psychiat. 104 (1970).. 23
- S. Zimberg, M.D., The Clinical Management of Alcoholism (New York: Brunner/Mazel 1982).....14, 19, 26



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ON WRITS OF CERTIORARI  
TO THE UNITED STATES COURTS OF APPEALS  
FOR THE SECOND CIRCUIT AND THE  
DISTRICT OF COLUMBIA CIRCUIT

---

BRIEF OF AMICUS CURIAE  
NATIONAL COUNCIL ON ALCOHOLISM, INC.

---

STATEMENT OF INTEREST<sup>1</sup>

The National Council on Alcoholism (NCA) is a nation-wide independent, non-profit organization whose mission is to combat alcoholism and related problems by encouraging the prevention and treatment of this disease, by increasing public awareness and understanding about its nature and consequences, and by promoting the development of sane and humane public policies for resolving the many tragic problems that alcoholism creates in this society.<sup>2</sup>

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<sup>1</sup> Pursuant to Rule 36 of the Supreme Court Rules, written consent to file this brief has been obtained by counsel of record for all parties. The letters of consent have been filed with the Clerk of Court.

<sup>2</sup> NCA's major programs include alcoholism prevention and education, public information, public policy advocacy, conferences and publications. NCA's network of 190 state and local nonprofit affiliates conduct similar activities in  
(continued...)

The cases of Traynor v. Turnage and McKelvey v. Turnage present issues of paramount concern to NCA. Since its founding in 1944, NCA has sought to end the stigma that historically has been attached to alcoholism, and to foster understanding of the fact that alcoholism is neither misconduct nor a moral failing, but a complex and insidious medical condition that can and must be treated. NCA has long supported all necessary efforts to enhance the effective treatment of the disease of alcoholism and ensure the fair treatment of alcoholics -- especially

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<sup>2</sup>(...continued)  
their areas and provide information and referral services to families and individuals seeking help with an alcohol or other drug problem. NCA sponsors National Alcohol Awareness Month in April and National Fetal Alcohol Syndrome Awareness Week. NCA also conducts the National Alcoholism Forum, the nation's oldest general-interest conference on alcoholism.

those who have successfully arrested their illness.

The Veterans' Administration (VA) regulation whose classification of alcoholism is at issue in these cases strikes at the heart of NCA's 43-year effort to dispel the myths and misunderstanding that persist in some quarters about the causes and nature of alcoholism.

By classifying "primary" alcoholism as "willful misconduct", the VA regulation (38 U.S.C. § 3.301(c)(2)) categorically excludes an entire group of veterans who have successfully recovered from alcoholism from participating in the VA's educational assistance benefits program. (See 38 U.S.C. § 1662(a)(1)). This archaic, erroneous and stigmatizing classification is in direct conflict with both current medical understanding and the clear congressional mandate not to

discriminate on the basis of handicap, contained in § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982).

The VA's regulation reflects precisely the sort of misperceptions about alcoholism that in the past have posed the worst barriers to the effective prevention and treatment of this disease. Its continuing existence thwarts the successful treatment and rehabilitation of alcoholics, and throws into jeopardy the legal rights of persons and families who have already suffered too much from alcoholism and its devastating consequences.

For these reasons, NCA files this brief amicus curiae. Its purpose is to urge the Court to recognize the true nature of alcoholism, as reflected in two important Acts of Congress, and to give real meaning to the nondiscrimination mandate of § 504 as it affects those



veterans whose handicap is a history of alcoholism successfully overcome.

#### SUMMARY OF ARGUMENT

"When I use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I chose it to mean -- neither more nor less."

"The question is," said Alice, whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be the master, that is all".<sup>3</sup>

Alcoholism is a disease. This fact has been recognized by all major national (and international) medical, psychiatric, alcoholism treatment and

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<sup>3</sup> Lewis Carroll, Through the Looking Glass, (Ch. 6: Humpty Dumpty), reprinted in Alice in Wonderland and Other Favorites, Washington Square Press (New York 1951) at 190. This was quoted by S. Blume, M.D., in "The Disease Concept of Alcoholism, 1983", 5 J. of Psychiat. Treatment and Evaluation 471 (1983) (reviewing societal perceptions and medical understanding of alcoholism over the centuries).

public health organizations during the past thirty years. (Point I)

The fact that alcoholism is a disease has also been recognized by the Congress in two statutes it has enacted in the last seventeen years, the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 and the Rehabilitation Act of 1973. In the first, Congress defined alcoholism as "an illness requiring treatment and rehabilitation" (42 U.S.C. § 4541 (1982)). In the second, Congress defined alcoholism as a "handicap" within the meaning and protection of § 504 (29 U.S.C.A. §§ 794, 706(8) (West Supp. 1987)). (Point II)

The Veterans' Administration regulation conclusively defining "primary" alcoholism as nothing more than "willful misconduct" (38 C.F.R. § 3.301 (c)(2))

cannot be squared with the fact that alcoholism is a disease or the laws that Congress has passed defining alcoholism as an illness to be treated and classifying those who suffer from it as handicapped individuals to be protected from discrimination. In this debate over the meaning of words, Congress is the master.

The VA's regulation defining alcoholism as "willful misconduct" violates § 504 of the Rehabilitation Act. The VA's definition is based upon the very sort of archaic attitude toward the handicap of alcoholism that § 504 was designed to overcome. The lower court's reliance on "popular moral philosophy" and "general societal perceptions" about alcoholism to uphold the VA's regulation in effect endorsed discrimination against alcoholics simply because of the "prejudiced fears or ignorance of others."

School Board of Nassau Co., Fla. v. Arline, 107 S.Ct. 1123, 1129 (1987). Arline makes clear that Congress intended that no one may, by focusing on one aspect of a handicap, take it outside the scope of § 504. (Point III)

POINT I: ALCOHOLISM IS NOT WILLFUL MISCONDUCT.

A. Alcoholism Is Recognized and Classified as a Disease by National and International Medical, Psychiatric and Public Health Authorities

The fifty years that have passed since Prohibition have seen the phenomenal growth of medical and scientific knowledge about the etiology and nature of alcoholism. This increased knowledge has produced a consensus, shared by medicine, psychiatry and public health authorities, that alcoholism is a disease, as well as a major national health problem.

The medical community now understands alcoholism to be a complex, progressive and insidious disease characterized by increasing dependence upon consumption of the drug alcohol, and by impairment in social or occupational functioning. This understanding is reflected in the growing awareness in the public at large that alcoholism is an illness, one that afflicts some ten million adult Americans.<sup>4</sup>

Thus alcoholism was recognized as a medical disorder by the World Health Organization in 1951, see World Health Organization, International Classification of Diseases Ninth Edition (ICD-9) (1977)

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<sup>4</sup> See 42 U.S.C. § 4541(a)(2) (1982) (Congressional finding); U.S. Department of Health and Human Services, 6th Special Report on Alcohol and Health, (Washington, D.C. 1986). See also Blume, supra note 1, at 472 (noting results of 1982 Gallup survey which found that 79% of adult Americans agreed that "alcoholism is a disease and should be treated as a disease").

(No. 303, alcohol dependence syndrome); and by the American Medical Association in 1956, see, American Medical Association, Manual on Alcoholism (1957). The American Psychiatric Association (APA) has also recognized alcoholism as a diagnosable and treatable illness for many years. It has classified alcoholism as a distinct category in every edition its Diagnostic and Statistical Manual of Mental Disorders (DSM) since 1953. The diagnostic criteria for alcoholism, as set forth in the current edition of this manual, the Diagnostic and Statistical Manual-III (1980), are commonly accepted and widely used by the medical profession; and the most recent update of this manual, the Diagnostic and Statistical Manual-IIIR (1987), continues this practice.<sup>5</sup>

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<sup>5</sup> See DSM-III (1980), No. 303.9x (alcohol dependence). The Committee on  
(continued...)



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<sup>5</sup>(...continued)

Definitions of the National Council on Alcoholism and the American Medical Society on Alcoholism also prepared a definition of alcoholism which was approved by the National Council on Alcoholism's Public Policy Committee in 1976. See 85 Annals of Internal Medicine, No. 6 (1976). This definition provides as follows:

Alcoholism is a chronic, progressive, and potentially fatal disease. It is characterized by tolerance and physical dependency or pathologic organ changes, or both -- all the direct or indirect consequences of the alcohol ingested.

1. "Chronic and progressive" means that the physical, emotional, and social changes that develop are cumulative and progress as drinking continues.
2. "Tolerance" means brain adaptation to the presence of high concentrations of alcohol.
3. "Physical dependency" means that withdrawal symptoms occur from decreasing or ceasing consumption of alcohol.
4. The person with alcoholism cannot consistently predict on any drinking occasion the duration of the episode or the quantity that will be consumed.

(continued...)

## B. The Etiology, Nature and Clinical Course of Alcoholism

Millions of adult Americans suffer from alcoholism. However, it is clear that the simple act of drinking -- by itself -- does not itself make an individual an alcoholic. Of all the people who drink, only about five to ten percent

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<sup>5</sup>(...continued)

5. Pathologic organ changes can be found in almost any organ, but most often involve the liver, brain, peripheral nervous system, and the gastrointestinal tract.
6. The drinking pattern is generally continuous but may be intermittent, with periods of abstinence between drinking episodes.
7. The social, emotional, and behavioral symptoms and consequences of alcoholism result from the effect of alcohol on the function of the brain. The degree to which these symptoms and signs are considered deviant will depend upon the cultural norms of the society or group in which the person lives.

become alcoholic.<sup>6</sup> No one chooses to become an alcoholic or to begin drinking alcoholically. Instead, persons who become alcoholic generally begin drinking for the same reasons as those who are

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<sup>6</sup> See Affidavit of Anne Geller, M.D., at JA 34, 38; Affidavit of Sheldon Zimberg, M.D., at JA 56, 60. Dr. Geller, a medical specialist, and Dr. Zimberg, a psychiatrist, are two physicians widely recognized as experts in the field of alcoholism research and treatment. They summarized the medical and psychiatric professions' current knowledge about and understanding of alcoholism in affidavits submitted to the District Court in support of petitioner Traynor's successful motion for summary judgment.

Dr. Geller is the Medical Director of the Smithers Alcoholism Treatment Center (which is affiliated with St. Luke's/Roosevelt Hospital in New York) and a faculty member of the Columbia College of Physicians and Surgeons. She has conducted research and taught about alcoholism, and treated thousands of those who have suffered from that condition, for twenty years. Dr. Zimberg, a psychiatrist and teaching physician as well, is the author of The Clinical Management of Alcoholism (Brunner/Mazel, New York 1982). He served on the APA advisory committee for Substance Abuse Disorders which helped develop the definition and diagnostic criteria for alcoholism which appear in the DSM-III.

able to remain social drinkers. What distinguishes the two categories of drinkers -- the social drinker and the alcoholic drinker -- is the latter's loss of control over his or her drinking. "In contrast to the social drinker, once alcohol is in his or her system, the alcoholic's ability not to pick up another drink is lost; it is not something over which he or she has conscious or voluntary control." Geller Aff., at JA 43.

Indeed, the American Medical Association has identified this loss of control as the clinical hallmark of alcoholism.<sup>7</sup>

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<sup>7</sup> In its Manual on Alcoholism, supra, at 11, the AMA noted:

Consumption of very substantial amounts of alcohol ... and frequent intoxication per se are not necessarily equated with alcoholism, even though these signs usually are prominent in the course of the illness. It can happen that some alcoholics actually consume less liquor over a given length of time than do some social drinkers, but  
(continued...)

This failure of control is not because the alcoholic is irresolute or morally weak, but because he or she is alcoholic. "Th[e] inability to alter or modify one's drinking pattern or to control intake once begun is a unique feature of alcoholic drinking, and not a part of social drinking." Geller Aff. at JA 43.

The principal characteristic which the two categories of drinkers share is the initial decision to begin consuming alcohol, and it is this feature alone which can accurately be described as willful or volitional conduct. Social drinking of alcoholic beverages is a voluntary act engaged in by most Americans, and is a socially acceptable practice in the United

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<sup>7</sup>(...continued)

this fact in itself does not alter the basic condition nor make it less serious. The key factor is in [loss of] control.

Id. at 6. [Emphasis supplied.]

States. No one begins to drink with an intent to develop alcoholism, or with the knowledge that he or she will become alcoholic. It is utterly illogical to label the behavior of engaging in social drinking as "misconduct".<sup>8</sup>

Alcoholism is a complex and progressive disease of insidious onset which typically

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<sup>8</sup> Indeed, many diseases may be triggered by an individual's voluntary behavior. Cigarette smoking may lead to lung cancer, respiratory illnesses and hypertension; eating patterns affect the progress of diabetes; and improper diet or lack of exercise may contribute to the development of heart disease. Yet the Veterans' Administration does not classify these illnesses as the result of "willful misconduct." It is irrational to single out alcoholism for different treatment. In this respect, however, alcoholism is not alone. It was not so long ago that mental illness, too, was labeled as merely bizarre or inappropriate behavior; and that the victims of a variety of mental disorders were also stigmatized and isolated from society rather than treated for their respective disorders.



develops over the course of many years.<sup>9</sup>

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<sup>9</sup> The VA distinguishes between "primary" alcoholism (which is not the result of an underlying psychiatric disorder) and "secondary" alcoholism (which is). But the "primary/secondary" distinction in the VA's regulatory scheme is illusory and clinically incorrect.

First, in the overwhelming majority of cases, alcoholism is not the result or manifestation of some other preexisting or underlying psychiatric disorder. Geller Aff., at JA 43. While many persons suffering from alcoholism present symptoms of depression and anxiety, which occur as the result of alcohol's effect on neurotransmitters in the brain, only some individuals develop alcoholism secondary to a distinct psychiatric disorder. *Id.* See generally, M. A. Schuckit, M.D., "Genetic and Clinical Implications of Alcoholism and Affective Disorder," 143 *Am. J. Psychiatry* 140 (1986).

Second, the VA's distinction does not in fact recognize "primary" alcoholism as any kind of disorder or disability but, rather, defines it simply as bad conduct. This definition ignores the fact that, while the medical and psychiatric professions do, indeed, recognize and distinguish between alcoholism as a primary disorder (i.e., a medical condition that is not accompanied by another psychiatric disorder) and alcoholism as a secondary disorder (i.e., a medical condition accompanied by a separate psychiatric disorder), those professions both recognize primary alcoholism as a distinct disease -- as the VA does not. This fact is re-

(continued...)

As the disease progresses, alcohol becomes more and more essential for the alcoholic to function. "The alcoholic drinker does not drink for enjoyment, but to medicate himself or herself." Geller Aff., at JA 40. Many alcoholics develop not merely a

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<sup>9</sup>(...continued)

flected in, among other things, the APA's classification of alcoholism as a distinct substance abuse disorder in the DSM-III. See note 5 supra. Zimberg, The Clinical Management of Alcoholism, supra, at 40; and Schuckit, supra, at 140-143.

Finally, as was pointed out by both experts who offered affidavits in the District Court in Mr. Traynor's case, the kind of diagnosis that is made in the case of any particular alcoholic -- "primary" or "secondary" -- is "to a considerable degree fortuitous." Geller Aff. at JA 44; Zimberg Aff. at JA 65-68. This is because the diagnosis is often a function of the nature of the facility where the individual was treated, and has little to do with the patient's clinical history. Thus, patients who are diagnosed and treated in a psychiatric facility are more likely to be labeled as "secondary" alcoholics, while patients treated in detoxification units of general hospitals are usually given a diagnosis of "primary" alcoholism. Zimberg Aff. at JA 67; Geller Aff. at JA 44. See also Zimberg, The Clinical Management of Alcoholism, supra note 6, at 40.

psychological but a physiological dependency upon alcohol, which is characterized by an increasing tolerance for the drug, and withdrawal upon its discontinuance. Withdrawal may cause anxiety, nausea, irritability, seizures, and even death. Geller Aff., at JA 42. "In essence, the physiologically dependent alcoholic uses the drug alcohol out of pure physical necessity." Zimberg Aff., at JA 65.

Moreover, the alcoholic's increasing dependence upon alcohol, whether psychological or physiological, is not something over which he or she is able to exercise conscious control. As the individual becomes progressively more dependent upon alcohol, the phenomenon of denial sets in. As Dr. Geller explained:

Denial is an unconscious mental mechanism (unlike lying) by which an individual protects himself from recognizing his increasing need for alcohol and from being aware of the often-devastating consequences of

its use. Denial is a primitive defense mechanism that all people have and may regress to in order to safeguard themselves against the recognition of something which is threatening to their well-being. It is the ostrich syndrome: I don't see it; therefore it is not there. Denial is a common phenomenon in childhood; it is also a defense mechanism that adults often regress to when faced with catastrophe, illness or other life-threatening circumstances. Denial is a universal characteristic of alcoholism, and is inevitably present in the alcoholic.

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It is this combination of gradually increasing dependency and denial that makes alcoholism so insidious an illness: the alcoholic simply does not and cannot let himself recognize what is happening to him.

Geller Aff., at JA 41-42 (emphasis added).

Whether any particular individual who drinks will become an alcoholic is largely the result of forces beyond his or her control. Extensive research has demonstrated that the disease of alcoholism is produced by a confluence of genetic/biochemical, environmental and sociocultural

factors. Geller Aff., at JA 38-40; Zimberg Aff., at JA 60-63.

Research on the genetic component has provided strong evidence that there is an inherited predisposition to developing alcoholism. Individuals with a family history of alcoholism, including parents, siblings, grandparents, uncles and aunts, are at greater risk for developing the disease.<sup>10</sup>

In 1970, a study of the families of 259 hospitalized alcoholics from both a state and a private hospital was per-

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<sup>10</sup> See M. A. Schuckit, M.D., Genetic and Clinical Implications of Alcoholism and Affective Disorder, 143 Am. J. Psychiatry 140, 143-144 (1986). Although research on the genetic component of alcoholism has not been able precisely to determine what it is in an individual's genetic makeup that predisposes him or her to the disease, there is evidence that physical abnormalities in the way these individuals metabolize alcohol may play a role. See Geller Aff., at JA 39. This theory is currently being investigated in order to more fully understand the biochemical nature of alcoholism.

formed. The researchers interviewed first-degree relatives (parents, children, siblings) of the alcoholic individuals, and found that 50 percent of the male first-degree relatives were alcoholic.<sup>11</sup> In another study of half-siblings, children of alcoholic parents raised in foster homes with non-alcoholic parent figures were compared with children without a biological alcoholic parent raised in foster homes with an alcoholic parent figure. For every comparison of the relative influence of having a biological alcoholic parent as opposed to having lived with an adoptive alcoholic parent figure, the biological influence predominated in relation to the development of

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<sup>11</sup> J. Winoker, T. Reich, J. Rimmer et al., "Alcoholism: III Diagnosis and Familial Psychiatric Illness in 259 Alcoholic Probands," 23 Arch. Gen. Psychiat. 104 (1970).



alcoholism.<sup>12</sup> Additional research was conducted on adopted children and twins in Scandinavia. These adoptee studies concerned children of alcoholic families who were adopted away from their biological parents at birth. Those studies showed that, while the incidence of alcoholism among the general population of males in Scandinavia is approximately 7 percent, the incidence of the disease among adoptees with one alcoholic biological parent rose to 25 percent; and, if both biological parents were alcoholic, the incidence of alcoholism in their adopted-away offspring rose to 50 per-

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<sup>12</sup> M. A. Schuckit, D.W. Goodwin & J. Winokur, "A Half-Sibling Study of Alcoholism", 128 Amer. J. Psychiat. 1132 (1972); and see R.J. Cadoret, C.A. Cain, & W. Grove, "Development of Alcoholism in Adoptees Raised Apart from Biologic Parents," 37 Arch. Gen. Psychiat. 561 (1980). See also Zimberg Aff., at JA 60.

cent.<sup>13</sup>

Another factor contributing to the development of alcoholism is an individual's environmental and sociocultural background. The use of and attitudes towards alcohol differs between and within societies, cultures, subcultures, ethnic, and religious groups. These differences fall within several general types and help to determine general rates of alcoholism.

For example, in groups or societies where drinking is accepted and where drinking practices feature heavy, regular drinking, or drinking-to-drunkenness, individuals tend to be vulnerable to

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<sup>13</sup> M. Bohman, S. Sigvardsson & R. Cloninger, "Inheritance of Alcohol Abuse: Cross-Fostering Analysis of Alcoholic Men", 38 Arch. Gen. Psychiat. 861 (1981). See also M. Bohman, S. Sigvardsson & R. Cloninger, "Maternal Inheritance of Alcohol Abuse: Cross-Fostering Analysis of Adopted Women", 38 Arch. Gen. Psychiat. 965 (1981); and Geller Aff., at JA 39.

developing alcoholism. On the other hand, in societies which encourage total abstinence from alcohol, alcoholism is relatively rare. Finally, in societies where the use of alcohol is accepted within specific settings, rituals, or ceremonial rites, the incidence of alcoholism varies with the degree of controls for strict use and against excesses.<sup>14</sup>

In short, alcoholism is a disease, like many others, that results from a complex combination of genetic predisposition, environmental factors, cultural attitudes and intentional actions having unintended consequences. It is compounded by the addictive nature of the drug alcohol (which, like many other drugs, can lead to both psychological and physio-

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<sup>14</sup> Zimberg, Clinical Management of Alcoholism, supra, at 12 - 14; see also Zimberg Aff., at JA 61-62.

logical dependence), and the compelling phenomenon of denial.

To characterize this medical disorder as the result of "willful misconduct" -- or, as the majority opinion in McKelvey v. Turnage put it, as a "willfully caused handicap", 792 F.2d at 200 -- is to completely disregard the known data about the disease, the overwhelming opinion of medical and psychiatric authorities and treatment professionals, and the scientific and medical knowledge that these authorities have developed about alcoholism during the last fifty years.

POINT II: CONGRESS HAS DETERMINED THAT ALCOHOLISM IS AN ILLNESS AND A HANDICAP, AND HAS FORBIDDEN DISCRIMINATION AGAINST ALCOHOLICS

Since 1970, when it enacted the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act, Congress has recognized that "alcoholism is an illness requiring treatment and rehabilitation", 42 U.S.C. §4541(a)(8) (1982), and has sustained a comprehensive federal effort to foster the treatment and enhance the rehabilitation of persons suffering from that illness.<sup>15</sup>

In enacting and extending both the Comprehensive Alcoholism Act and the Rehabilitation Act, Congress has repeatedly noted that the federal legislative commitment to treat alcoholism as a medical

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<sup>15</sup> See Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970, Pub. L. 91-616, 84 Stat. 1848, codified as amended at 42 U.S.C. §§ 4541 et seq. (1982) (the "Comprehensive Alcoholism Act").

rather than a moral impairment reflects the long-standing consensus of health authorities about the nature of, and appropriate response to, alcoholism.<sup>16</sup> Congress has also often noted and deplored the lingering social "stigma" and underlying attitudes of blame that persist toward those who suffer from alcoholism.<sup>17</sup>

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<sup>16</sup> See, e.g., S. Rep. No. 91-1069, 91st Cong., 2d. Sess. 1, 3 (1970); S. Rep. No. 96-103, 96th Cong., 1st Sess. 3-4, reprinted in 1979 U.S. Code Cong. & Ad. News, 2681, 2682-83 (noting, when enacting and extending the Comprehensive Alcoholism Act, that by 1968 "alcoholism had been recognized as a disease by the World Health Organization, the American Medical Association, the American Hospital Association, and the American Psychiatric Association"). See also 124 Cong. Rec. S15,569 (daily ed. Sept. 20, 1978) (remarks of Sen. Hathaway).

<sup>17</sup> S. Rep. No. 96-103, 96th Cong., 1st Sess. 15, reprinted in 1979 U.S. Code Cong. & Ad. News 2681, 2694 (discussing 1979 extension of Comprehensive Alcoholism Act); 124 Cong. Rec. S15,567-69 (daily ed. Sept. 20, 1978) (considering 1978 amendments to Rehabilitation Act, described below) (remarks of Sen. Stafford).



In 1973, Congress enacted the first federal civil rights law protecting individuals from discrimination on the basis of handicap: Title V of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791-794a (1982). Section 504 of the Rehabilitation Act provides that "no otherwise qualified individual with handicaps...shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity" covered by the law. 29 U.S.C.A. §794 (West Supp. 1987).

That alcoholism is among the "mental or physical impairments" which constitute handicaps for purposes of § 504 was confirmed in 1977 by the United States Attorney General, re-confirmed in 1977 and 1978 by the Department of Health, Education and Welfare, and confirmed yet again

in 1978 by Congress itself.

In 1977, the Attorney General issued an official opinion concluding that "alcoholics...are included within the statutory definition of 'handicapped individuals' for purposes of Title V, which includes the antidiscrimination provision in section 504...." 43 Op. Att'y Gen. No. 12 (1977), at 2. The Attorney General based this opinion on the legislative history of the statute, the statute's broad definition of "handicapped individual", and the "substantial body of authority...that alcoholism and drug addiction are diseases...." Id. at 7.

Subsequently, the United States Department of Health, Education and Welfare, which was charged with the general interpretation and implementation of section 504, issued regulations which also concluded that persons with histories of

alcoholism are "handicapped individuals" within the scope of protection of § 504.<sup>18</sup> HEW's treatment of the issue explicitly recognized "the medical and legal consensus that alcoholism and drug addiction are diseases, although there is disagreement as to whether they are primarily physical or mental." 42 Fed. Reg. 22,686 (1977).

Finally, in 1978, Congress amended the Rehabilitation Act's definition of "handicapped individual" in order to clarify § 504's coverage of current and recovered alcoholics in the context of employment, and in the course of doing so made the Act's protection of persons with conditions or histories of alcoholism

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<sup>18</sup> See Exec. Order No. 11,914, 3 C.F.R. 117 (1977); 42 Fed. Reg. 22,676, 22,686 (1977); 43 Fed. Reg. 2132, 2134 (1978). See also 45 C.F.R. §85.31 (1985).

explicit.<sup>19</sup> In the debates leading up to the amendment, members of Congress noted once again the "ample evidence that... alcoholics are subject to discrimination in access to benefits, services and employment", and emphasized again that "alcoholism...alone may not be the sole basis for discrimination." 124 Cong. Rec. S15,568, S15,569 (1978) (remarks of Sen. Hathaway) (emphasis supplied).

In its 1978 amendments to the Act, Congress also extended section 504's prohibition against discrimination based on handicap to all federal agencies, including the Veterans' Administration. 1978 Rehabilitation Act Amendments, Pub.

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<sup>19</sup> See the Rehabilitation, Comprehensive Services and Developmental Disabilities Amendments of 1978, Pub. L. 95-602, §122(a)(6), 92 Stat. 2984-85 (1978) ("1978 Rehabilitation Act Amendments"). This was formerly codified at 29 U.S.C. § 706(7)(B) (1982), and is now codified at 29 U.S.C. § 706(8)(B) (West Supp. 1987).

L. 95-602, §119(2), 92 Stat. 2982 (1978), codified at 29 U.S.C. §794 (1982).

These legislative developments leave no doubt that Congress has determined that alcoholism is a disease and that alcoholics are handicapped individuals who may not be denied the benefits of any government program solely because of their handicap.

Indeed, this Court recently pointed to the 1978 amendments and their explicit coverage of alcoholics in reaching its conclusion that § 504 prohibits blanket discrimination against persons with handicaps that may engender fear or disapproval in others:

[I]n its 1978 amendments...Congress recognized that employers and other grantees might have legitimate reasons not to extend jobs or benefits to drug addicts and alcoholics, but also understood the danger of improper discrimination against such individuals if they were categorically excluded from coverage under the Act. Congress therefore rejec-

ted the original House proposal to exclude addicts and alcoholics from the definition of handicapped individual, and instead adopted the Senate proposal excluding only those alcoholics and drug abusers "whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question..." (citations omitted).

School Board of Nassau Co., Fla. v. Arline, 107 S.Ct. 1123, 1130, n.14 (1987).

The Veterans' Administration's regulation and policy does precisely what Congress has prohibited: by defining alcoholism as "willful misconduct", the VA categorically excludes most alcoholics from using their benefits solely because of their handicap.



POINT III: THE VA'S REGULATION  
DEFINING ALCOHOLISM AS "WILLFUL  
MISCONDUCT" VIOLATES § 504 OF THE  
REHABILITATION ACT

In Arline, this Court recognized that  
the Rehabilitation Act's broad definition  
of "handicapped individual" demonstrated

Congress' concern with protecting  
the handicapped against discrimina-  
tion stemming not only from simple  
prejudice, but from 'archaic at-  
titudes and laws'

which reflect continuing public ignorance  
of and insensitivity to many handicaps.

School Board of Nassau Co., Fla. v. Ar-  
line, supra, 107 S.Ct. at 1126 (1987).

The VA regulation that defines alcoholism  
as "willful misconduct" is an archaic law  
stemming from archiac attitudes; it is  
based on prejudice and ignorance; it  
violates both the letter and spirit of  
the Rehabilitation Act.

It is not surprising that the VA's  
definition of alcoholism as willful mis-  
conduct had its origin in a regulation

issued in 1933,<sup>20</sup> during Prohibition, at

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<sup>20</sup> As the Board of Veterans' Appeals  
pointed out in its final decision denying  
Mr. Traynor's administrative appeal upon  
reconsideration, the VA regulation whose  
conclusive classification of "primary"  
alcoholism as "willful misconduct" is  
challenged in this case had its origin in  
a Presidential regulation issued pursuant  
to Title I of the Economy Act of 1933:

[Pursuant to] the Public Law by  
which Congress initially authorized  
the President of the United States  
to promulgate Veterans Administra-  
tion regulations, Public Law 73-2,  
[§§ 3, 4, 48 Stat. 8, 9 (1933)]  
...President Franklin D. Roosevelt  
promulgated old Veterans Regulation  
No. 10, precursor of current regula-  
tions, mandating that a disability  
be held to have resulted from mis-  
conduct when it was "[incurred] by  
an act contrary to the principles  
of good morals; or as a result of  
gross negligence, gross carelessness,  
alcoholism, drug addiction,  
self-infliction of wounds, etc."  
(Emphasis supplied.) Since then, a  
distinction has been maintained  
between fortuitously incurred  
disease or disability, for which  
gratuitous Veterans' Administration  
benefits may be afforded, and other  
nonfortuitous disabilities incurred  
at the hands of the claimant him-  
self....

(86-622 Traynor Cert. Pet. at 118a-119a).

a time when the true nature of alcoholism as a disease was not yet known. Despite the tremendous advances the past fifty years have brought in understanding and treating the disease of alcoholism, the concept of alcoholism as nothing more than one among several sorts of bad conduct has been set in stone by the VA. Indeed, the VA's current concept of alcoholism in 38 C.F.R. § 3.301(c)(2) (1985) is identical to that of the original 1933 regulation.<sup>21</sup>

The effect of this regulation is to deny to alcoholics like Traynor and McKelvey -- solely on the basis of their hand-

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<sup>21</sup> While the agency now makes a distinction between so-called "primary" alcoholism (that which is not a manifestation of an underlying psychiatric disorder) and "secondary alcoholism" (that which is a manifestation of an underlying psychiatric disorder), it continues to define "primary" alcoholism itself as "willful misconduct" per se. See supra, note 9.

icap -- the right to extend their educational assistance benefits, a right that is accorded to all other handicapped veterans.

The VA argues that it is not denying Traynor and McKelvey extensions because of their illness, but rather because it has conclusively determined that their illness was caused by the veterans' behavior. As discussed in Point II above, this outdated view of alcoholism has been flatly rejected both by Congress and by all leading medical authorities, including the American Medical Association and the American Psychiatric Association.<sup>22</sup>

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<sup>22</sup> The ruling of the Court of Appeals in McKelvey v. Turnage below also ignored Congress' explicit recognition that alcoholism is an illness and a handicap for purposes of § 504 of the Rehabilitation Act. Instead, the Court agreed with the VA's contention that its definition of alcoholism as mere misconduct still finds some support "within the field of medicine and within what might be termed the arena (continued...)"

Furthermore, this Court rejected essentially the same argument in Arline. In that case, the school district claimed it had not fired a teacher because she was handicapped, but had fired her because it

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22 (...continued)  
of popular moral philosophy". Id., 792 F.2d at 202. That finding and conclusion, however, are fundamentally erroneous.

As discussed in Point II, the overwhelming majority of medical opinion has flatly rejected the concept of alcoholism so readily accepted by the court below. The continuing debate in the fields of medicine, psychiatry, alcoholism treatment and public health generally focuses not on whether alcoholism is or is not a distinct and diagnosable disease -- indeed, both primary and secondary alcoholism are each recognized as separate clinical entities -- but rather on whether, in any particular individual suffering from it, this illness should appropriately be treated as primarily a medical or a psychiatric disorder.

Indeed, the Congress has acknowledged the existence of this debate, but has deemed it irrelevant for purposes of § 504 whether this handicap is, or is treated as, a medical or a psychiatric impairment. It is alcoholism itself, in whatever form, that Congress has deemed to be a handicap under the Act. See 29 U.S.C. § 706(8)(B), (West Supp. 1987); 42 Fed. Reg 22,686 (1977).

presumed that her illness was contagious. The Court's response to that argument was that "Arline's contagiousness and her physical impairment each resulted from the same underlying [disease]". Id., 107 S.Ct. at 1128. The school district could not, by seizing upon one aspect of the disease, remove it from § 504's protection. It could not put forward "myths and fears about disability and disease" as justification for its discriminatory action. Id., 107 S.Ct. at 1129.

The same reasoning applies in this case. Congress has determined that alcoholism is a handicap and has protected those with that disease from discrimination. The VA cannot argue that it is not discriminating against petitioners as alcoholics, but is denying them benefits because it has conclusively presumed that alcoholism is always caused by willful



misconduct. The physical act of drinking and the impairment caused by alcoholism "result from the same underlying [disease]." The VA cannot, by seizing upon one aspect of the disease of alcoholism -- the fact that it involves a physical act -- remove it from § 504's protection. It cannot put forward "society's accumulated myths and fears" as justification for its discriminatory action.

Yet this is precisely what the majority in McKelvey v. Turnage would permit the VA to do. The majority accepted the VA's ironclad classification of "primary" alcoholism as simply willful "conduct" as a "reasonable" basis for discriminating against those engaging in such "conduct". Id., 792 F.2d 194, 200, 201 (D.C. Cir. 1986) (emphasis in original). Indeed, the majority did exactly what Arline condemned: it looked to "the arena of popular

moral philosophy" and to "general societal perceptions" about alcoholism and found there a basis for justifying the VA's classification of alcoholism as "willful misconduct." Id., 792 F.2d at 201, 202.<sup>23</sup>

The VA regulation challenged in this case perpetuates the long-discredited

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<sup>23</sup> The McKelvey majority also erred in assuming that an agency subject to § 504 need only show a "reasonable" basis for excluding any group of the persons protected by § 504 from any covered program or activity, 792 F.2d at 200. At the very least, § 504 demands a "substantial" showing that [a covered agency's exclusionary policy or] regulations are justified", as the District Court in Traynor correctly noted. Traynor v. Walters, 606 F.Supp. 391, 400 (S.D.N.Y. 1985) (emphasis added) (citing New York State Ass'n for Retarded Children v. Carey, 612 F.2d 644, 650 (2nd Cir. 1979)). See also Strathie v. Dept. of Transportation, 716 F.2d 227, 229-231 (3rd Cir. 1983); Bentivegna v. U.S. Dept. of Labor, 694 F.2d 619, 621-22 (9th Cir. 1982); Shirey v. Devine, 670 F.2d 1188, 1204 & n.46 (D.C. Cir. 1982) (discussing § 501 as it relates to § 504); Pushkin v. Regents of Univ. of Colorado, 658 F.2d 1372, 1383-1387 (10th Cir. 1981) (all adopting substantial justification requirement).

myth that alcoholism is the result of misbehavior, no different than deliberately shooting oneself in the foot. In fact, medical authorities have conclusively established that alcoholism is a disease, and Congress has included alcoholism in the list of handicaps encompassed under the Rehabilitation Act.

Only by ruling that the challenged regulation is illegal under § 504 of the Rehabilitation Act can this Court ensure that veterans with histories of alcoholism who seek to participate in the VA's educational assistance program will have their qualifications for such participation assessed, not on the basis of unfounded "prejudice [or] stereotype", but on the basis of "appropriate findings of fact ..., based on reasonable judgments given the state of medical knowledge" about alcoholism as it is understood today.

Arline, supra, 107 S.Ct. at 1131. Only if this Court thus ensures that these individuals (like all other persons with handicaps within the protection of the Rehabilitation Act) are judged on their individual merits will they finally be assured the "meaningful access" to the VA's educational assistance program, like all other programs covered by the Act, that § 504 was designed to secure. Alexander v. Choate, 469 U.S. 287, 301 (1985).

The VA's regulation flatly violates § 504 of the Rehabilitation Act, and the erroneous ruling and judgment below must therefore be reversed.

CONCLUSION

For the reasons discussed above, the Court should reverse the decision of the D.C. Circuit in McKelvey v. Turnage, reverse the decision of the Second Circuit in Traynor v. Walters, and invalidate the VA's willful misconduct regulation because it violates § 504 of the Rehabilitation Act.

Dated: May 28, 1987

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**AMICUS CURIAE**

**BRIEF**

MAY 28 1987

JOSEPH F. SPANIO, JR.  
CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1986

EUGENE TRAYNOR,

*Petitioner*

v.

THOMAS K. TURNAGE, ADMINISTRATOR OF VETERANS  
AFFAIRS AND VETERANS' ADMINISTRATION,

*Respondent*

JAMES P. MCKELVEY,

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v.

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*Respondent*

On Petitions for Writs of Certiorari to the  
United States Court of Appeals  
for the Second and District of Columbia Circuits

BRIEF OF THE AMERICAN MEDICAL ASSOCIATION  
AND THE AMERICAN PSYCHIATRIC ASSOCIATION  
AS *AMICI CURIAE*  
IN SUPPORT OF BOTH PETITIONERS

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May 28, 1987

## QUESTION PRESENTED

*Amici curiae* will address the following question:

Whether a Veterans' Administration regulation, which defines the disease of primary alcoholism as *per se* willful misconduct and thus automatically denies extended education benefits to veterans suffering from the disease without an individualized determination about the origins and nature of their affliction, violates Section 504 of the Rehabilitation Act of 1973?



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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1986

Nos. 86-622 and 86-737

EUGENE TRAYNOR,

*Petitioner*

v.

THOMAS K. TURNAGE, ADMINISTRATOR OF VETERANS  
 AFFAIRS AND VETERANS' ADMINISTRATION,

*Respondent*

JAMES P. MCKELVEY,

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v.

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*Respondent*

On Petitions for Writs of Certiorari to the  
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BRIEF OF THE AMERICAN MEDICAL ASSOCIATION  
 AND THE AMERICAN PSYCHIATRIC ASSOCIATION  
 AS *AMICI CURIAE*  
 IN SUPPORT OF BOTH PETITIONERS

INTEREST OF *AMICI CURIAE*

*Amicus* American Medical Association ("AMA") is a private, voluntary, non-profit organization of physicians. The AMA was founded in 1846 to promote the science and art of medicine and the improvement of public health. Today, its membership exceeds 280,000 physi-



cians and medical students nationwide. *Amicus* American Psychiatric Association ("APA") is the nation's largest professional association specializing in psychiatry, with a membership exceeding 30,000 physicians. APA's purposes include promoting the welfare of patients who require psychiatric services.

At issue in this case is a regulation of the Veterans' Administration ("VA") which conclusively presumes that alcoholism involves "willful misconduct" unless it can be shown that the alcoholism is the product of an underlying psychiatric disorder. The VA's *per se* rule was upheld by the D.C. Circuit on the basis that it was consistent with "general societal perceptions" concerning alcoholism. No. 86-737, Pet. App. 12a. The court expressly disavowed reliance upon any "medical judgments" about alcoholism on the ground that they are "immaterial." *Id.* at 11a, 12a. *Amici* believe that disregard of medical facts concerning a handicap, such as alcoholism, is manifestly inconsistent with the language and purpose of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. Accordingly, *amici* wish to present their views concerning alcoholism and explain why it is inappropriate to permit the VA to deny veterans a benefit on the ground that their "handicap"—"primary alcoholism"—must always be the result of "willful misconduct."<sup>1</sup>

## MEDICAL, STATUTORY AND REGULATORY BACKGROUND

### A. Alcoholism Is A Disease

Ninety-five million Americans consume alcoholic beverages, and it is estimated that 11 percent, or 10 million of them, suffer from alcoholism. U.S. Dept. of Health,

<sup>1</sup> Pursuant to Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

Education, and Welfare, *The Alcohol, Drug Abuse, and Mental Health National Data Book* 15 (1980). Physicians estimate that between 20 and 25 percent of all general hospital admissions and one-third of all psychiatric admissions are directly or indirectly related to the use of alcohol. Knott, *Alcohol Problems: Diagnosis and Treatment* 6 (1986). When all the direct and indirect consequences of the disease are taken into account, alcoholism ranks as the third leading cause of death in the United States. Miller & Frances, *Psychiatrists and the Treatment of Addictions: Perceptions and Practices*, 12 *Am. J. Drug & Alcohol Abuse* 187, 188 (1986).

Alcoholism is defined generally as the chronic, pathological use of alcohol. There has been a consensus in the medical profession for nearly 30 years that such pathological use of alcohol is a disease. *Amicus* AMA first described alcoholism as a disease appropriate for medical treatment in 1956, stating that:

Alcoholism is an illness characterized by preoccupation with alcohol and loss of control over its consumption such as to lead usually to intoxication if drinking is begun; by chronicity; by progression; and by tendency toward relapse. It is typically associated with physical disability and impaired emotional, occupational, and/or social adjustments as a direct consequence of persistent and excessive use.

American Medical Association, *Manual on Alcoholism* 6 (1957). Similarly, *amicus* APA has long recognized that alcoholism is a disease, classifying it as a distinct mental disorder since the publication of its first edition of *Diagnostic and Statistical Manual of Mental Disorders* ("DSM") in 1952.<sup>2</sup> The World Health Organiza-

<sup>2</sup> The current diagnostic criteria for alcoholism are contained in DSM-III-R, published in 1987. Since 1980, the APA has subdivided the mental disorder of alcoholism into two general categories—alcohol dependence and abuse, and alcohol-induced organic mental disorders. The former category is what we commonly think of as

tion ("WHO") has recognized alcoholism as a distinct disease since 1951. *International Classification of Diseases, Ninth Edition* (ICD-9) (WHO, 1977) (No. 303, alcohol dependence syndrome).

Contrary to popular misconceptions, occasional excessive use of alcohol is not synonymous with the disease of alcoholism. As the AMA has emphasized, "[c]onsumption of very substantial amounts of alcohol . . . and frequent intoxication *per se* are not necessarily equated with alcoholism, even though these signs usually are prominent in the course of the illness." AMA, *Manual on Alcoholism* 6 (1957) (emphasis in original). Rather, the distinguishing feature of the disease of alcoholism is chronic, uncontrollable use. In the words of the original AMA statement on alcoholism, "[t]he key factor is in control." *Id.*

Unlike diseases such as tuberculosis that have purely physiological causes and manifestations, the disease of alcoholism has a variety of causes and a multitude of manifestations leading to physiological, psychological and social impairment. AMA Report of the Council on Scientific Affairs, *Alcoholism as a Disability* (Dec. 1980). The variety of causes and symptoms has complicated the task of developing diagnostic criteria for alcoholism. E.M. Jellinek, who is widely credited with spurring the medical community to recognize alcoholism as a disease, described five distinct types of alcoholism. Jellinek, *The Disease Concept of Alcoholism* (1960). Later, work by researchers from the Washington University in St. Louis led to the development of four categories of symptoms

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the disease of alcoholism, distinguished by chronic, pathological use of, and in some cases physical dependence on, alcohol. DSM-III, p. 169 (1980). In contrast, the second category includes a variety of organic mental disorders that are attributed to the ingestion of alcohol, such as alcohol hallucinosis and alcohol withdrawal delirium. DSM-III-R, pp. 127-34 (1987).

for use in diagnosing alcoholism. Feighner, *et al.*, *Diagnostic Criteria for Use in Psychiatric Research*, 26 Arch. Gen. Psychiatry 57, 60-61 (1972); see also Paredes, *Models and Definitions of Alcoholism*, in *Alcoholism: Development, Consequences, and Interventions* 57 (Estes & Heinemann eds. 1986). In 1972, the National Council on Alcoholism established elaborate criteria for the diagnosis of alcoholism, including 28 major and 58 minor physiological, behavioral, psychological and attitudinal parameters. Criteria Committee of the National Council on Alcoholism, *Criteria for the Diagnosis of Alcoholism*, 129 Am. J. Psychiatry 127-35 (1972).

Despite the difficulty of establishing universally agreed upon diagnostic criteria for alcoholism, the medical community has accepted a division of alcoholism into two very general diagnostic categories, primary and secondary, *Categories, Careers, and Outcomes of Alcoholism*, *The Lancet* 719 (March 19, 1986). This shorthand division distinguishes those patients whose illness is not the result of a pre-existing psychiatric disorder (primary alcoholism) from those whose illness is secondary to psychiatric problems (secondary alcoholism). *Id.* This division by etiology of alcoholism is useful for treatment purposes, but it does not distinguish types of alcoholism on the basis of which constitutes an illness. Both primary and secondary alcoholism are generally accepted by the medical community to be diseases.

In the last 20 years medical researchers have conducted extensive studies in order to determine the etiology of primary alcoholism. Those studies have revealed that primary alcoholism may result from a variety of causes and that certain factors predispose a given individual to developing primary alcoholism. Scientists have found that, in contrast to the development of secondary alcoholism, primary alcoholism has a strong genetic link. Family studies have revealed that sons and



daughters of alcoholics are three to four times as likely to develop primary alcoholism as are children of non-alcoholic parents. Schuckit, *Genetic Aspects of Alcoholism*, 15 Ann. Emerg. Med. 991, 992 (Sept. 1986). In order to separate out the impact of heredity from that of environment in the development of primary alcoholism, other researchers have studied alcoholism rates of adults in Sweden adopted before the age of 3. Those studies found that adopted sons whose biological fathers were alcoholic were three times more likely to become alcoholic than were adopted sons of non-alcoholic biological fathers. Bohman, *Some Genetic Aspects of Alcoholism and Criminality: A Population of Adoptees*, 35 Arch. Gen. Psychiatry 269-76 (1978).<sup>3</sup>

Environmental, socio-cultural and psychological factors play a role in the development of primary alcoholism,<sup>4</sup> much as they do in the development of diseases such as coronary atherosclerosis, diabetes and schizophrenia. Vaillant, *The Natural History of Alcoholism* 45-101 (1983). Those factors do not, however, rise to the level of psychiatric disorders as defined by the APA. Thus, the mere presence of a psychological component in the development of alcoholism in a given individual does not necessarily mean that the individual is afflicted with

<sup>3</sup> Further studies have also identified a severe type of hereditary predisposition that occurs only among men. The studies found that adopted sons whose biological fathers suffer from this male-limited alcoholism are 9 times more likely to develop the disease. National Institute on Alcohol Abuse and Alcoholism, *Alcoholism: An Inherited Disease* 9, 11 (1985), citing Cloninger, Bohman & Sigvardsson, *Inheritance of Alcohol Abuse*, 38 Arch. Gen. Psychiatry 861-68 (1981).

<sup>4</sup> Summarizing the results of the numerous studies of the genetic link in alcoholism, one researcher concluded that "[n]o findings from genetically-oriented research have disputed the significance of behavioral, psychodynamic, existential and social-group factors in . . . explaining the drinking of the alcoholic individual." Peele, *The Implications and Limitations of Genetic Models of Alcoholism and Other Addictions*, 47 J. Stud. Alcohol 63, 71 (1986).

"secondary alcoholism." Only when the alcoholism is the result or manifestation, in large part, of a pre-existing psychiatric disorder, is a diagnosis of secondary alcoholism appropriate. Schuckit estimates that 20 to 30 percent of alcoholics suffer from secondary alcoholism. Schuckit, *Genetic and Clinical Implications of Alcoholism and Affective Disorder*, 143 Am. J. Psychiatry 140 (1986).

The distinction between primary and secondary alcoholism is important in determining the most effective mode of treatment, but it may be difficult for the physician to make a proper diagnosis. For example, many alcoholics begin a pattern of chronic, uncontrolled drinking while quite young, some while still teenagers. DSM-III-R, p. 174 ("In males the onset [of alcohol dependence] is usually in the late teens or the 20s, the course is insidious, and the person may not be fully aware of his dependence on alcohol until the 30s.") Due to cultural factors and family income level, such youngsters may be very unlikely to receive any psychiatric evaluation that would *predate* the more immediately apparent "symptom" of excessive, uncontrolled drinking. Thus, it is unlikely that there would be a prior evaluation of psychiatric disorders to support a diagnosis of an individual's alcoholism as secondary.

The difficulty in establishing an accurate diagnosis of primary as opposed to secondary alcoholism is further complicated by the fact that primary alcoholics often exhibit symptoms of psychiatric disorders caused by the effect of alcohol on the neurotransmitters in the brain. For instance, an individual who is alcohol-dependent and has engaged in heavy drinking for an extended period of time may develop alcohol hallucinosis, a disorder in which the person suffers from hallucinations, often persecutory, that may be clinically indistinguishable from schizophrenia. DSM-III-R, pp. 131-32. Because a primary alcoholic may exhibit such symptoms of psychiatric disorders, it is necessary to observe a patient alcohol-free



for three or four weeks in order to establish an accurate diagnosis of primary as opposed to secondary alcoholism. Zimbert, *The Clinical Management of Alcoholism* 40 (1982). If the psychiatric symptoms persist once the physiological effects of alcoholism have subsided, the physician can reasonably assume that the psychiatric disorder is causal and predates the secondary manifestation of alcoholism. *Id.* But, alcoholics are typically admitted to medical or psychiatric facilities for a brief period of time (No. 86-622, Pet. App. 92a-93a; No. 86-737, C.A. App. 30-32 (despite serious alcoholism and related complications, neither petitioner was hospitalized for more than two weeks at any one time)), and therefore, the diagnosis of primary or secondary alcoholism rendered at such a time has little guarantee of accuracy.

In addition to the psychological consequences of anxiety and depression that often accompany alcoholism, there are a variety of organic diseases that may result from either primary or secondary alcoholism. Such diseases include cirrhosis of the liver and alcohol hepatitis (Zook & Moore, *High-cost Users of Medical Care*, 302 N. Engl. J. Med. 996 (1980)), erosive gastritis (Hall, Skinner & Israel, *Early Identification of Alcohol Abuse* :2: *Clinical and Laboratory Indicators*, 124 Can. Med. Assoc. J. 1279, 1280 (1981)), delirium tremens (*Id.*), hypertension (Ashley & Rankin, *Hazardous Alcohol Consumption and Diseases of the Circulatory System*, 41 J. Stud. Alcohol 1040 (1980)), cerebral atrophy, dementia and polyneuritis (Paredes, *Models and Definitions of Alcoholism*, in *Alcoholism: Development, Consequences, and Interventions* 54 (Estes & Heinemann eds. 1986)).

#### **B. Section 504 Recognizes Alcoholism As a Possible Handicap And Does Not Distinguish Between Primary and Secondary Alcoholism**

Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, prohibits an Executive agency from denying the benefits of any of its programs to someone solely on the basis

that the individual is handicapped. The statute provides in pertinent part:

No otherwise qualified handicapped individual in the United States, as defined in Section 7 [29 U.S.C. § 706(7)], shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency . . . .<sup>5</sup>

Section 504 has consistently been interpreted to include alcoholics as "handicapped individuals," and to treat alcoholism as a disabling disease.

When asked specifically to address the issue of alcoholism as a disability under Section 504 in 1977, the Attorney General issued a formal opinion confirming that "section 504 does in general prohibit discrimination against alcoholics and drug addicts in federally assisted programs solely because of their status as such, *just as it prohibits discrimination solely on the basis of other diseases or conditions covered by the Act* . . . . The legislative history of the Rehabilitation Act of 1973 indicates that drug addiction and *alcoholism were to be regarded as covered physical or mental disabilities*." 43 Op. Att'y Gen. No. 12 (April 12, 1977) at 2 (emphasis added).

In 1977, the Secretary of the Department of Health, Education and Welfare (HEW, now the Department of Health and Human Services) promulgated regulations pursuant to section 504 which prohibit federally-funded

<sup>5</sup> In October, 1986, the term "handicapped individual" was changed to "individual with handicaps" in response to testimony before Congress describing the former language as "inadvertently adding to the stereotype that persons with handicaps are less worthy." H. Rep. No. 571, 99th Cong., 2d Sess. 17, *reprinted in* 1986 U.S. Code Cong. & Ad. News 3471, 3487. Since the court of appeals discussed the prior language, we will cite to the pre-1986 language as well.

hospitals and outpatient facilities from discriminating against alcoholics in admission or treatment. 45 C.F.R. § 84.53. In an extensive analysis accompanying the regulation, the Secretary emphasized that there is a "medical and legal consensus" that alcoholism is a disease. 45 C.F.R. Part 84, App. A at 326. Moreover, the Secretary carefully distinguished between the "behavioral manifestations" of alcoholism, which may be taken into account when assessing eligibility for services, and the condition of alcoholism itself, which may not provide the basis for the denial of benefits or services. *Id.* The 1978 HEW guidelines implementing Section 504 specifically included alcoholics within the meaning of "handicapped person." The regulation provided that "'physical or mental impairment' [for the purposes of identifying a handicapped person] includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism." 43 Fed. Reg. 2137 (1978).

In 1978, Congress amended Section 504 to clarify, *inter alia*, that for the purposes of employment Section 504 does not treat an alcoholic whose current use of alcohol either prevents him from performing his job duties or presents a direct threat to the property or safety of others as a handicapped individual. 29 U.S.C. § 706 (7) (B). The amendment did not otherwise limit the applicability of Section 504 to alcoholics, clearly indicating that alcoholics otherwise remain protected under Section 504. Moreover, in 1978 Congress for the first time extended Section 504's prohibition against discrimination based on handicap to all federal agencies, including the Veterans' Administration. 29 U.S.C. § 794 (1982).<sup>6</sup>

<sup>6</sup> The VA regulations implementing Section 504 include the veterans' educational benefits program as one of the programs covered by Section 504. 38 C.F.R. Part 18, Subp. D, App. A. And, in 1980,

### C. The Veterans' Administration's Regulatory Scheme

Petitioners McKelvey and Traynor are veterans who had requested educational benefits from the Veterans' Administration pursuant to 38 U.S.C. § 1662. Although neither had fully used his benefits within the ordinary time provided for by the statute, both requested an extension of the time limit under a provision that grants such extensions to "any eligible veteran who was prevented from initiating or completing such veteran's chosen program of education within such time period because of a physical or mental disability which was not the result of such veteran's own willful misconduct." 38 U.S.C. § 1662(a) (1). Both claimed that they had been alcoholics during the period subsequent to their discharges and that their condition had precluded them from seeking an education within the specified period.

The VA rejected the extension on the ground that each petitioner's alcoholism had constituted "willful misconduct." That term is defined in the regulations as "an act involving conscious wrongdoing or known prohibited action [that] involves deliberate or intentional wrongdoing with knowledge of or wanton and reckless disregard of its probable consequences." 38 C.F.R. § 3.1(n). Although neither the statute nor the regulation makes any reference to "alcoholism," the VA has interpreted its regulation to require "primary alcoholism" to be treated automatically as "willful misconduct." V.A. Decision No. 988, Aug. 13, 1964. Because neither petitioner could prove that his alcoholism was the product of a distinct psychiatric disorder, the VA denied them benefits without any factual inquiry into whether either actually had engaged in any "willful misconduct" that caused his disease.

the VA adopted the HEW guidelines, specifically using the exact language quoted in the definition of "handicapped person." 38 C.F.R. § 18.403(j) (2) (i) (C).



The origins of the Veterans' Administration rule treating alcoholism as willful misconduct date back over fifty years, to a time when alcoholism was poorly understood by the general public and little studied by the medical community. The precursor to Section 3.301(c)(2) specified that disabilities resulting from "an act contrary to principles of good morals . . . gross negligence, gross carelessness [or] alcoholism" would be deemed the result of misconduct. Exec. Order 6098 (March 31, 1933). Thus, the original VA regulation created a *per se* rule that all disabilities caused by or resulting from alcoholism are necessarily due to willful misconduct.

By equating alcoholism with acts contrary to the "principles of good morals," the original VA regulation reflected Prohibition era concepts of alcoholism as a moral blight, a reflection of weak will rather than disease. Aaron & Musto, *Temperance and Prohibition in America: A Historical Overview* in *Alcohol and Public Policy: Beyond the Shadow of Prohibition* 160 (Moore & Gerstein eds. 1981). Under the then-dominant view of alcoholism often referred to as the "sin" model, the "sinful" alcoholic was considered capable of reforming himself through the exertion of will. *Id.* at 46. The Prohibition era roots and presumptions are also reflected in the first VA Administrator's Decision involving alcohol, in which the Administrator stated that "if in the drinking of any beverage for the purpose of enjoying its intoxicating effects, excessive indulgence leads to disability, *willful misconduct would undoubtedly inhere* in the act." Administrator's Decision, Veterans' Administration, No. 2 (March 21, 1931) (emphasis added).

The presumptions underlying the current *per se* rule, which treats primary alcoholism as willful misconduct, are contrary to the great weight of modern medical understanding of alcoholism. Since the original VA alcoholism decision in 1931, the medical understanding of

alcoholism has advanced enormously.<sup>7</sup> With the repeal of Prohibition in 1933 and the creation of Alcoholics Anonymous in 1935, social and medical views concerning alcoholism began to change. As noted, pp. 3-4 *supra*, by 1968 virtually every major medical and health organization had recognized alcoholism as a distinct, albeit complex disease. Congress explicitly recognized this medical consensus when it enacted and extended the Comprehensive Alcoholism Act, S. Rep. No. 103, 96th Cong., 1st Sess. 3-4, reprinted in 1979 U.S. Code Cong. & Ad. News, 2681, 2682-83. Despite the difficulty of making an accurate diagnosis of primary versus secondary alcoholism (*supra*, pp. 7-8), and despite the persuasive body of medical evidence demonstrating that factors entirely outside the control of the individual, such as genetic predisposition, play a crucial role in the development of primary alcoholism in many individuals, the Veterans' Administration has persisted in adhering to a *per se* rule that irrebuttably presumes that any veteran who is diagnosed as a primary alcoholic has engaged in willful misconduct. On the basis of that rule alone, petitioners were denied educational assistance benefits by the VA.

#### SUMMARY OF ARGUMENT

This case requires the Court to apply Section 504 to extensions of educational benefits that have been denied on the basis of a Veterans' Administration regulation which conclusively treats primary alcoholism as willful misconduct. Millions of Americans suffer from primary alcoholism, not only from the debilitating effects of the disease, but also from the moral stigma that many in society still attach to those who are diagnosed as alco-

<sup>7</sup> The advance in medical understanding of alcoholism in the past two decades is remarkable. In the words of a physician who has extensive experience treating alcoholism, "[w]e have learned more in the past 15 years about the disease of chemical dependency than in the past 5000 years." Talbott, *Alcoholism and Other Drug Addictions: A Primary Disease Entity*, 75 J. Med. Assn. Ga. 490 (August 1986).



holic. The causes and manifestations of alcoholism are diverse and vary greatly from individual to individual. Nevertheless, the VA refuses to treat primary alcoholics as individuals and instead categorically denies them extended educational benefits in clear disregard of Section 504's non-discrimination mandate.

As this Court recently reiterated in *School Board of Nassau County v. Arline*, No. 85-1277, slip op. (March 3, 1987), Section 504 was enacted to protect the handicapped against discrimination stemming from prejudice, fear and stereotype. In order to achieve this goal, Section 504 requires federal agencies to make reasonable, individualized medical judgments as to whether an individual is handicapped and "otherwise qualified" for a benefit. Furthermore, both the Attorney General and the Congress have made clear that Section 504 requires that individualized determinations be made concerning persons impaired by alcoholism.

However, neither petitioner in this case was permitted to present individualized evidence to the Veterans' Administration concerning the origins of his disease in order to show that there has been no willful misconduct. Despite the fact that both petitioners were handicapped and otherwise qualified within the meaning of Section 504 for extended educational benefits, both were automatically deemed ineligible for such benefits on the basis of an administrative rule that conclusively deems their primary alcoholism to have been caused by willful misconduct. Under the VA's rule, once a veteran is diagnosed as suffering from primary alcoholism, he or she is prevented from putting on any evidence that the cause of that alcoholism was not willful misconduct. This rule reflects nothing more than outdated attitudes towards, and fear of, alcoholism. It is also contrary to the great weight of contemporary medical evidence which views alcoholism as a disease of complex etiology that is often not the product of volition.

The court of appeals contends that this *per se* rule does not conflict with Section 504's clear prohibition against discrimination based on alcoholism because the rule looks to "conduct" rather than "handicap." This "distinction" between alcoholism as disease and alcoholism as conduct is invalid under Section 504 because it permits the VA to define as "conduct" what is in fact a handicap. If the agency is then permitted to prevent any proof that the individual did not engage in any willful misconduct, a handicapped individual will have lost by administrative fiat all the protections which Congress sought to provide by enacting Section 504.

Furthermore, no deference is owed to the VA's presumption that *all* primary alcoholism is the result of volitional conduct. The VA has never reconsidered its *per se* rule in light of Section 504's mandate of individualized decisionmaking. Thus, there is no administrative basis for the VA's approach other than a *post hoc* rationalization developed by counsel on appeal and not relied upon by the agency itself. No deference should be accorded to such *post hoc* rationalization.

## ARGUMENT

### I. SECTION 504 REQUIRES INDIVIDUALIZED DETERMINATIONS ABOUT WHETHER AN INDIVIDUAL WHO SUFFERS—OR WHO HAS SUFFERED—FROM THE DISEASE OF ALCOHOLISM IS "HANDICAPPED" AND "OTHERWISE QUALIFIED"

As this Court reiterated last term in *School Board of Nassau County v. Arline*, No. 85-1277, slip op. (March 3, 1987) ("*Arline*"), Congress enacted Section 504 to protect the handicapped against discrimination stemming from prejudice, fear and stereotype which was often based on "archaic attitudes and laws." *Arline*, slip op. at 4 quoting from S. Rep. No. 1297, 93rd Cong., 2d Sess.

50 (1974). The statutory language, legislative history, implementing regulations and decisions of this Court make clear that the key to achieving this goal is an *individualized* assessment—based on the facts relevant to the allegedly handicapped person—of whether the individual is or was handicapped and is “otherwise qualified” for a benefit.

The express language of Section 504 emphasizes that no “otherwise qualified handicapped *individual*” shall be discriminated against on the basis of his handicap. 29 U.S.C. § 794 (emphasis added). A “handicapped individual” is defined in the statute as

“any person who (i) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.” 29 U.S.C. § 706(7)(B) (emphasis added).

Similarly, the legislative history of Section 504 clearly shows that Congress wanted individualized assessments on the issues of “handicap” and “otherwise qualified” in order to avoid unthinking or outmoded decisions based on the myths and stereotypes which had unfairly shackled the handicapped in the past. *Arline*, slip op. at 11. As the key Senate Report stated,

“The public lacks adequate knowledge about the potential of these [handicapped] individuals to contribute significantly to society. Too often we *automatically* make the assumption that nothing can be done. . . . It is against the basic tenets of the scientific process to make an assumption of no hope and no help. No less should be true of public policy. In the case of individuals with handicaps, making this assumption all too often has resulted in the violation of their basic rights as human beings and has condemned them to live useless lives.” S. Rep. No.

1297, 93rd Cong., 2d Sess. 50 (1974) (emphasis added).<sup>8</sup>

The regulations implementing Section 504 which were promulgated in 1977 by the then Department of Health, Education and Welfare also emphasize the importance of individualized assessments. 42 Fed. Reg. 22676 (1977); 45 C.F.R. § 84.3(j). See also *Arline*, slip op. at 5 (“In determining whether a *particular individual* is handicapped as defined by the Act, the regulations promulgated by the Department of Health and Human Services are of significant assistance.”) (emphasis added).<sup>9</sup> The definitions of a “physical or mental impairment,” 45 C.F.R. § 84.3(j)(2)(i), “major life activities,” 45 C.F.R. § 84.3(j)(2)(ii), and “otherwise qualified,” 45 C.F.R. § 84.3(k), clearly indicate that these fundamental inquiries required by the statute are to be conducted on a case-by-case, person-by-person basis.

This Court’s *Arline* decision underscores the importance of individualized inquiries into facts relating to individuals who have been handicapped, like petitioners here, by a disease, albeit in *Arline* the disease was contagious. With respect to the issue of whether a person is handicapped, this Court noted that Congress sought to counter “society’s accumulated myths and fears about disability and disease.” *Arline*, slip op. at 9. The Court emphasized that:

“The Act is carefully structured to replace such reflexive reactions to actual or perceived handicaps

<sup>8</sup> This language related specifically to the need for a national conference mandated by the same legislation which broadened the definition of “handicapped individual.” But the passage expresses the general Congressional policy which underlies Section 504.

<sup>9</sup> This Court has recognized that the regulations were drafted with the “oversight and approval of Congress, see *Consolidated Rail Corporation v. Darrone*, 465 U.S. 624, 634-635, and nn.14-16 (1984); they provide ‘an important source of guidance on the meaning of § 504,’ *Alexander v. Choate*, 469 U.S. 287, 304, n.24 (1985).” *Arline*, slip op. at 5.



with actions based on reasoned and medically sound judgments . . . ." *Id.* at 10.

Accordingly, the Court concluded that mere contagion would not automatically remove an individual from the definition of "handicapped individual" and each case should be "evaluated in light of medical evidence" and other relevant facts to determine if the person was indeed handicapped within the meaning of the statute. *Id.* at 11. Similarly, the Court stressed that, with respect to the issue of whether a person with a disease was "otherwise qualified" for a particular benefit, the decisionmaker should "conduct an individualized inquiry and make appropriate findings of fact" relevant to the specific person. *Id.* at 12 (emphasis added). The Court stated that:

"Such an [individualized] inquiry is essential if § 504 is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes or unfounded fear . . . ." *Id.* (emphasis supplied.)

Finally, both the Attorney General and the Congress have made clear that individualized determinations are to be made under Section 504 with respect to persons impaired by alcoholism. In 1977, responding to a request from the Secretary of HEW, the Attorney General issued an opinion concluding that alcoholics could be "handicapped" and "otherwise qualified" within the meaning of the statute, depending on the facts relating to each individual. 43 Op. Att'y Gen. No. 12 (April 12, 1977). In words with prophetic import for this case, the Attorney General stated,

". . . [A] person could not be refused service solely because he is or has a record of being . . . [an] alcoholic . . . .

". . . [T]he statute requires that . . . [affected government agencies] not automatically deny employment or benefits to persons solely because they might

find their status as alcoholics . . . personally offensive." *Id.* at 12-13.

As this Court stated in *Arline*, slip op. at n.14, Congress in 1978 recognized that government agencies might have "legitimate reasons not to extend jobs or benefits to . . . alcoholics, but also understood the danger of improper discrimination against such individuals if they were categorically excluded from coverage under" Section 504. Thus, Congress rejected a House proposal to exclude alcoholics from Section 504's protection and instead reiterated the need for individualized determinations on the issues of "handicap" and "otherwise qualified." *Arline* slip op. at n.14, citing 124 Cong. Rec. 30322 (1978). See also 43 Op. Atty. Gen. No. 12 (1977).

\* \* \* \*

There appears to be no serious dispute in this case that petitioner McKelvey is both "handicapped" and "otherwise qualified" within those statutory terms as construed by this Court.<sup>10</sup> Surely if Ms Arline was a handicapped individual due to her single hospitalization, *Arline*, slip op. at 6-7, then petitioner McKelvey, who was hospitalized 33 times for alcoholism (No. 86-737, C.A. App. 30-32) is also a handicapped individual. See 29 U.S.C. § 706(7)(B)(ii) (person "handicapped" if he has a

<sup>10</sup> Similarly, there is no dispute in *Traynor* that petitioner is both "handicapped" and "otherwise qualified" within the meaning of the statute. The district court found that Traynor began drinking to intoxication when he was between eight and ten years old, that he drank heavily during his military service, and that he was hospitalized five times between 1970 and 1974 for "treatment for saturated alcoholic disorders." No. 86-622, Pet. App. 44a-45a. After his last hospitalization, Traynor joined Alcoholics Anonymous and has not had a drink since February, 1974. *Id.* at 46a. Therefore the court found that he was alcoholic and a "handicapped individual" within the meaning of Section 504. *Id.* at 74a. The court further found that Traynor was "otherwise qualified," having been honorably discharged from the armed services and having subsequently enrolled in a degree program in mechanical engineering at the City College of New York. *Id.* at 46a-47a, 75a-76a.



record of an impairment which has substantially limited major life activities). Similarly, at the time that he applied for an extension of VA education benefits, petitioner McKelvey was successfully treated for alcoholism and was able to meet "the academic and technical standards requisite to admission or participation in the recipient's education program or activity." See 38 C.F.R. § 18.403(k)(3) (VA definition of "otherwise qualified") for educational benefits incorporating HHS regulation. 45 C.F.R. § 84.3(k)(3). No. 86-737, Pet. App. 43a (McKelvey "otherwise qualified"). Indeed, although it felt bound to deny petitioner McKelvey an extension due to the *per se* effect of the regulation at issue here, the Board of Veterans Appeals stated clearly that there is "no doubt that if an extension were granted [McKelvey] would use the benefits wisely and become a more productive member of society." *Id.* at 29a. To deny petitioners this beneficial opportunity on the basis of an arcane regulation which stereotypes alcoholics is plainly inconsistent with Section 504.

## II. THE VETERANS' ADMINISTRATION'S DETERMINATION THAT PRIMARY ALCOHOLISM IS "WILLFUL MISCONDUCT" PER SE IS INVALID UNDER SECTION 504

The Veterans' Administration has by regulation and administrative interpretation conclusively determined that primary alcoholism is the result of willful misconduct. See pp. 11-13, *supra*. Thus, an individual whose alcoholism is not found to have been caused by a psychiatric disorder or whose alcoholism has not led to an underlying organic disorder (such as cirrhosis) is automatically ineligible for an extension of time in which to receive educational benefits that otherwise would be allowed for a disability pursuant to 38 U.S.C. § 1662(a)(1). This *per se* administrative rule, which prevents petitioners from presenting evidence from their own personal case histories to prove that their primary alcohol-

ism was not caused by willful misconduct, is clearly invalid under Section 504.<sup>11</sup>

As noted above, Section 504 was enacted to prevent categorical exclusion of handicapped individuals from federal programs and to ensure that decisions were based on the facts of each individual case. Section 3.301(c)(2) is just such an unlawful categorical rule. As interpreted by the Veterans' Administration, the regulation prevents primary alcoholics from putting on any evidence that the cause of that alcoholism was not willful misconduct. Such an outdated view is contrary to the great weight of contemporary medical evidence which views primary alcoholism as a disease with complex genetic, psychological, social and familial origins. See pp. 5-8, *supra*. Although the origins of primary alcoholism are not entirely clear and may differ in individual cases, it does not follow that primary alcoholism is thus necessarily caused by willful misconduct in each individual case. *Id.*<sup>12</sup> Under fundamental principles of Section 504, an individual claimant suffering from primary alcoholism should at least have the opportunity to present evidence that the disease was not the product of "willful misconduct." Thus, the Veterans' Administration's interpretation of 38 C.F.R. § 3.301(c)(2) is clearly unlawful.

The D.C. Circuit's broad assertion (No. 86-737, Pet. App. 14a) that the Veterans' Administration was not dis-

<sup>11</sup> The Veterans' Administration does not dispute that its educational benefits program is subject to the limitations and requirements of Section 504. See 38 C.F.R. Part 18, Subp. D., App. A.

<sup>12</sup> The VA is misusing the primary-secondary distinction. That distinction has nothing to do with whether the individual's alcoholism is necessarily volitional. The VA's interpretation of "willful misconduct" also assumes incorrectly that it is always possible to differentiate between "primary" and "secondary" alcoholism. This assumption is manifestly incorrect. See pp. 6-8, *supra*. Moreover, in light of the real possibility that a given veteran may not receive an accurate diagnosis of primary as opposed to secondary alcoholism (*see supra* pp. 7-8), it would be manifestly unfair to deny benefits solely on the basis of this diagnosis.

criminating against petitioner McKelvey "solely by reason of his handicap" but rather on the basis of his "conduct" simply begs the question whether the conduct was the result of disease or the result of willfulness. That must be a question of fact in each individual case, given the complexity of alcoholism and the numerous individual manifestations of the disease. Indeed, the court of appeals' conclusory point was effectively rejected by this Court in *Arline*. The Court did not accept the contention of the United States that the effect of a disease on others could be separated from the effect of the disease on the handicapped individual in order to allow irrational discrimination by federal fund recipients based on fear of contagiousness. As this Court stated,

"Arline's contagiousness and her physical impairment each resulted from the same underlying condition, tuberculosis. It would be unfair to allow an employer to seize upon the distinction between the effects of a disease on others and the effects of a disease on a patient and use that distinction to justify discriminatory treatment." *Arline*, slip op. at 7.

Similarly, it would be "unfair" to deny petitioners an extension of the time for receiving education benefits based upon a distinction between the disease and conduct which may be part of the disease. *Arline* thus compels rejection of the court of appeals' blanket view that a person with primary alcoholism may automatically be denied an extension because of his or her "conduct."

The court of appeals has done clear violence to the intent of Congress in Section 504 by holding that the decision whether primary alcoholism is "willful misconduct" is not a "medical judgment" but should be decided on the basis of "general societal perceptions regarding personal responsibility." No. 86-737, Pet. App. 12a. It is precisely these kinds of perceptions which Congress concluded should not serve as the basis for denying someone who is handicapped by a disease the benefits of a federally conducted program or activity. This is not to say that

conduct relating to the consumption of alcohol is not or can never be "willful misconduct," but it does mean that the VA is precluded from concluding that all primary alcoholism is volitional, regardless of the veterans' proffered evidence to the contrary.<sup>13</sup>

Nor is there any basis, under a proper reading of Section 504, for the court of appeals' view that deference is owed to the "reasonableness" of the agency's view that primary alcoholism is *always* the result of "willful misconduct." No. 86-737, Pet. App. 11a.<sup>14</sup> The origins of 38 C.F.R. § 3.301(c)(2) go back nearly 60 years to the Prohibition era.<sup>15</sup> There has been no analysis by the VA in the modern era of the changed medical views concerning alcoholism, including the policy statements of *amici* American Medical Association and American Psychiatric Association.

<sup>13</sup> There is no reason for the Court in this case to attempt to sort out what types of conduct related to alcohol consumption can properly be deemed "willful misconduct." Once the Court holds that some primary alcoholism is not "volitional," then the VA should evaluate on a case-by-case basis whether the veteran seeking benefits has in fact willfully become or remained an alcoholic. In this case, petitioners offered evidence showing that their alcoholism in effect started when they were teenagers or even younger and was in large part encouraged by their families at that time. If so, it would be unwarranted to conclude that their alcoholism was the product of volition, much less that it was a consequence of any "willful misconduct."

<sup>14</sup> Moreover, the concern of the court of appeals that an individualized interpretation of willful misconduct would interfere with the VA's ability to administer its disability program is unfounded. No. 86-737, Pet. App. 26a. There might be circumstances in which the VA could find that a veteran was not "otherwise qualified" due to his "willful misconduct," if, for example, in conjunction with other factors supporting a finding of willful misconduct, the VA found that an alcoholic had been informed about his illness by a professional and informed about the need for treatment, yet he nevertheless declined to seek any treatment which might permit him to control his illness. Such a rule would provide significant incentive for alcoholic veterans to seek treatment which, if successful, would end their need for disability benefits.

<sup>15</sup> See p. 12, *supra*.



tion that alcoholism is a disease with complex origins, which cannot be dealt with categorically as willful. There has been no administrative record concerning alcoholism developed by the Veterans' Administration since Section 504 was enacted, even though the statute clearly requires careful analysis of contemporary knowledge about handicapping diseases and individualized decisionmaking in the context of such an analysis. Thus, the purported "reasonableness" of the agency's categorical interpretation is supported factually by nothing more than a single footnote in the agency's appellate brief. No. 86-737, Pet. App. 11a, citing *Br. of Respondent Turnage* at pp. 18-19 n.4. This kind of *post hoc* rationalization will not suffice to justify disregarding the mandate of Section 504 to provide individualized evaluations of the medical condition of handicapped individuals who are being denied benefits. *Cf. Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962). Under Section 504, an agency must, at a minimum, analyze the available evidence about a given handicap before setting policy for making individualized determinations as to that handicap.<sup>16</sup>

<sup>16</sup> This Court need only decide in this case that the VA's administrative interpretation is invalid under Section 504. It need not decide whether there is an inherent and irreconcilable conflict between Section 504 and 38 U.S.C. § 1662(a)(1). There is no indication that Congress clearly incorporated the Veterans' Administration's willful misconduct regulation when it reenacted the statutory time prescription of 38 U.S.C. § 1662(a)(1). As Judge Ginsburg ably demonstrated in her dissent in *McKelvey*, the legislative history of Section 1662(a)(1) is at best ambiguous in referring to VA standards for determining "willful misconduct." No. 86-737, Pet. App. 23a-24a. Moreover, it is the VA's administrative interpretation of its regulation that creates the direct conflict with Section 504. The Senate Report language relied upon by the VA indicates congressional concern that the same standards be applied in all VA programs for determining when a disability is the result of willful misconduct. The Senate Report language clearly cannot be construed to indicate congressional incorporation of every administrative interpretation of all related VA regulations.

[Footnote continued]

Accordingly, assuming no jurisdictional bar,<sup>17</sup> the cases should be remanded to the Veterans' Administration with instructions to allow petitioners to introduce evidence that their alcoholism was not caused by their own willful misconduct.

### CONCLUSION

For the reasons stated above, the American Medical Association and the American Psychiatric Association respectfully request that this Court declare invalid, under Section 504, 38 C.F.R. § 3.301(c)(2) as interpreted and applied by the Veterans' Administration.

Respectfully submitted,

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<sup>16</sup> [Continued]

Finally, under traditional principles of statutory construction, whenever two statutes are capable of being construed harmoniously by looking to the plain meaning of each, that plain meaning should be given effect to avoid conflict. *Watt v. Alaska*, 451 U.S. 259, 267 (1981) ("We must read the statutes to give effect to each if we can do so while preserving their sense and purpose," citing *Morton v. Mancari*, 417 U.S. 535, 551 (1974)). The administrative interpretation by the Veterans' Administration would lead to just such an unnecessary conflict, and accordingly should be rejected.

<sup>17</sup> *Amici* take no position on the jurisdictional issues in this case.



**AMICUS CURIAE**

**BRIEF**

**MAY 23 1987**

Nos. 86-622 and 86-737

JOSEPH F. SPANIOLO, JR.  
CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1986

EUGENE TRAYNOR,

v.

*Petitioner,*

THOMAS K. TURNAGE, ADMINISTRATOR  
OF VETERANS' AFFAIRS AND  
VETERANS' ADMINISTRATION,

*Respondent.*

JAMES P. MCKELVEY,

v.

*Petitioner,*

THOMAS K. TURNAGE, ADMINISTRATOR  
OF VETERANS' AFFAIRS AND  
VETERANS' ADMINISTRATION,

*Respondent.*

On Writs of Certiorari to the United States Courts of Appeals  
for the Second Circuit and the Circuit  
for the District of Columbia

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### **QUESTION PRESENTED**

Whether, under section 211(a) of the Veterans' Benefits Law, 38 U.S.C. § 211(a), the federal courts have jurisdiction to review and set aside regulations promulgated and policies adopted by the Veterans' Administration that are in excess of or contrary to the agency's authority under the Veterans' Benefits Law or other provisions of federal law.



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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1986

Nos. 86-622 and 86-737

EUGENE TRAYNOR,

v. *Petitioner,*

THOMAS K. TURNAGE, ADMINISTRATOR  
 OF VETERANS' AFFAIRS AND  
 VETERANS' ADMINISTRATION,

*Respondent.*

JAMES P. MCKELVEY,

v. *Petitioner,*

THOMAS K. TURNAGE, ADMINISTRATOR  
 OF VETERANS' AFFAIRS AND  
 VETERANS' ADMINISTRATION,

*Respondent.*

On Writs of Certiorari to the United States Courts of Appeals  
 for the Second Circuit and the Circuit  
 for the District of Columbia

BRIEF AMICUS CURIAE OF  
 VIETNAM VETERANS OF AMERICA  
 IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE <sup>1</sup>

This brief is filed on behalf of the Vietnam Veterans of America ("Vietnam Veterans") in support of peti-

<sup>1</sup> Pursuant to Rule 36 of the Supreme Court Rules, written consent to file this brief has been obtained from counsel of record for all parties. The letters of consent have been filed with the Clerk of the Court.



tioners. Vietnam Veterans is the largest national service organization devoted exclusively to serving the interests and addressing the concerns of veterans who served in the military during the Vietnam era. A non-profit organization founded in 1978 and chartered by an Act of Congress, Vietnam Veterans has a membership of 35,000 with 295 chapters nationwide.

The interest of Vietnam Veterans in the present litigation is to ensure that section 211(a) of the Veterans' Benefits Law, 38 U.S.C. § 211(a), be read in accordance with its express terms and with Congress' intent to preclude judicial review only of Veterans' Administration ("VA") decisions in individual benefits claims cases.<sup>2</sup> Vietnam Veterans' purpose in seeking a ruling that section 211(a) has limited preclusive effect is to guarantee that the VA not be allowed to act contrary to its statutory authority in the promulgation of regulations and adoption of policies affecting millions of Vietnam era and other veterans.

Vietnam Veterans, through Vietnam Veterans of America Legal Services, offers many different kinds of assistance to its members ranging from legal representation in VA proceedings to the publication of educational materials. One of the most important objectives of Vietnam Veterans is to ensure that the VA acts consistently with the provisions of the Veterans' Benefits Law. As part of this effort, Vietnam Veterans has served as coun-

<sup>2</sup> Vietnam Veterans believes that section 211(a) does not bar review of those Veterans' Administration actions that the agency itself has described as "its regulations and substantive agency actions of broad application." See *H.R. 585 and Other Bills Relating to Judicial Review of Veterans' Claims: Hearings Before the Committee on Veterans' Affairs, House of Representatives, 99th Cong., 2d Sess., Vol. II, 328* [hereinafter cited to as "1986 House Hearings"]. For purposes of this brief, Vietnam Veterans refers to these categories of Veterans' Administration actions as "regulations and policies."

sel for individual veterans and groups of veterans seeking judicial review of the validity of important VA regulations and policies that affect many of its members. One of the policies that Vietnam Veterans has challenged in litigation is the same one challenged in the cases now before this Court. Vietnam Veterans has been acting as co-counsel in *Buck v. Veterans Administration*, No. CV-86-3522 (E.D. Pa. Oct. 16, 1986) (order dismissing complaint), *appeal docketed*, No. 86-1656 (3rd Cir. Oct. 28, 1986), a case in which the plaintiff has challenged the validity of the VA policy that excludes certain veterans disabled by alcohol from participation in the veterans pension program. The district court dismissed the complaint in *Buck* on the ground that the court was precluded from hearing the case by section 211(a). On appeal the Third Circuit has stayed proceedings in *Buck* pending the outcome of the cases currently before this Court. Vietnam Veterans urges this Court to sustain petitioners' challenges on the merits to the VA alcoholism policy, as well as to adopt a reading of section 211(a) that will permit judicial review of such policies and regulations.

In Vietnam Veterans' experience, section 211(a) is the critical statutory provision in determining whether or not the Veterans' Administration will be held accountable to apply the provisions of the Veterans' Benefits Law and other federal statutes rationally and fairly. Simply put, if section 211(a) is construed broadly to prohibit court review of Veterans' Administration regulations and policies that are arguably unlawful, the Veterans' Administration will be largely unconstrained in implementing its own will, rather than that of Congress. The narrower reading of section 211(a) advocated by Vietnam Veterans here would allow veterans' rights groups, like Vietnam Veterans and other interested parties, to resort to the courts to ensure that, at least on the level of regulations and policies, the Veterans' Administration actually implements the will of Congress.

### SUMMARY OF ARGUMENT

The jurisdictional issues presented by these consolidated cases are the subject of sharply conflicting decisions by the courts of appeals. As a result of the existing disarray in judicial interpretation of section 211(a), critical issues affecting thousands of veterans may be totally insulated from judicial review. That result is neither required nor intended by section 211(a).

Section 211(a) of the Veterans' Benefits Law clearly precludes federal court review of Veterans' Administration decisions on individual veterans' claims for benefits provided under the Veterans' Benefits Law. The statute does not preclude judicial review of the validity of Veterans' Administration regulations and policies of broad application. Any attempt to construe section 211(a) more broadly must be rejected in light of the strong presumption that final agency action is reviewable unless there is "persuasive reason to believe" that Congress intended to bar such review. *Bowen v. Michigan Academy of Family Physicians*, 106 S. Ct. 2133, 2135 (1986). This presumption can be overcome only by specific language barring review, or by a strong showing of congressional intent, based on specific legislative history, or through the legislative scheme of the statute. None of these indicators of congressional intent to bar judicial review exists in the case of section 211(a).

First, the language of section 211(a) does not reveal a congressional intent to prohibit judicial review of the validity of VA regulations and policies. Instead, the language of the statute only bars review of VA "decisions" on claims of individual veterans for benefits. Second, the legislative history of section 211(a) confirms that the congressional intent to preclude judicial review extends only to adjudication of individual benefits claims. The statutory language of the precursors of section 211(a) indicates that there was to be no review of individual benefits determinations. The various alterations made to

the language of the "limited review" provision were not intended to and did not alter the original scope of section 211(a). Post-enactment congressional consideration of the statute has also relied on an interpretation of section 211(a) which allows for judicial review of the validity of VA regulations and policies. This reliance has been fostered by the position taken by the Veterans' Administration, which has consistently maintained before Congress that section 211(a) does not need to be amended because it does not bar review of the validity of VA regulations and policies of broad application.

Finally, the purposes underlying section 211(a), as identified by this Court in *Johnson v. Robison*, 415 U.S. 361 (1974), would not be served by construing the statute to bar judicial review of VA regulations and policies of broad application. Judicial review of the validity of regulations would not overload the courts with cases concerning veterans benefits. The validity of a regulation affecting *all* veterans can be readily established, typically in a single litigation. The small number of judicial challenges to VA regulations presented to those federal courts authorizing review of VA regulations and policies under section 211(a) supports this conclusion. In addition, judicial review of the validity of regulations and policies would not intrude upon VA decision making. The validity of regulations is a matter clearly within the competence of the federal courts, and those courts can defer to the agency's expertise by exercising a more lenient standard of review where circumstances so warrant.



## ARGUMENT

### I. THE TRAYNOR COURT'S OVERLY BROAD READING OF SECTION 211(a) THREATENS TO PRECLUDE JUDICIAL REVIEW OF ISSUES OF GREAT CONCERN TO VETERANS

By its own terms, section 211(a) prohibits review of decisions of the VA regarding individual veterans' entitlement to benefits. Irreconcilable conflicts now exist, however, as to whether section 211(a) has any preclusive effect on judicial review of VA determinations other than individual benefits decisions. In the wake of this Court's decision in *Johnson v. Robison*, 415 U.S. 361 (1974), four courts of appeals have held that section 211(a) does not bar review of VA regulations or other VA policies of broad application. Other courts of appeals—including the Second Circuit in the case now before this Court—have taken exactly the opposite position, broadly construing section 211(a) to immunize virtually every action of the VA from judicial scrutiny.<sup>3</sup>

This sharp conflict creates an untenable situation in which veterans' ability to challenge the rules and policies that govern their statutory right to benefits is not determined by jurisdictional principles and congressional intent, but by the location of the court in which the claim arises. As a result of the existing disarray in judicial interpretation of section 211(a), significant challenges to VA actions of broad import may go unheard and the VA

<sup>3</sup> Although the case of petitioner McKelvey does not directly raise the judicial review issue, it illustrates the need for a uniform and reasoned approach to review of VA regulations and policies. The Court of Appeals for the District of Columbia stated that in making its decision it did not "pass on whether [section] 211(a) precludes review of veterans' benefit regulations to determine whether they exceed the VA's statutory authority" because under the peculiar circumstances of that case such a determination was unnecessary. 792 F.2d 194, 199 (D.C. Cir. 1986). The *McKelvey* court's resolution of the jurisdictional question provides little guidance as to the scope of 211(a).

may avoid any obligation to conform its rules and policies to congressional directives.

The conflict as to the scope of section 211(a) has been heightened by the VA itself. While repeatedly testifying before congressional committees that the statute does not bar review of VA regulations and policies, the VA has taken a directly contrary position in the courts, insisting—as in the instant cases—that VA regulations and policies are immune from judicial review.

The need for a determination by this Court as to the precise scope of section 211(a) is clear and urgent. The cases now before this Court, and in particular the Second Circuit's decision in *Traynor*, provide a vehicle for resolving the conflict between the circuits and removing the need for continuous relitigation of the scope of section 211(a). This Court should not delay in providing the lower courts with clear direction as to the proper interpretation of this statute.

\* \* \* \*

Section 211(a) of the Veterans' Benefits Law, 38 U.S.C. § 211(a) (1982), is a "limited review" provision. Section 211(a) provides in relevant part:

the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents and survivors shall be final and conclusive and no . . . court . . . shall have power or jurisdiction to review any such decision

. . . .

38 U.S.C. § 211(a) (emphasis added).

The provision was clearly designed to exempt some VA actions from judicial scrutiny. It has long been accepted that judicial review of adjudications of the benefits claims of individual veterans is precluded by section 211(a). *Walters v. National Association of Radiation Survivors*, 473 U.S. 305, 307 (1985); *Johnson v. Robison*,



415 U.S. at 367. This preclusion is evident from the language of section 211(a).

However, as this Court announced in *Johnson v. Robison*, not all actions of the Veterans' Administration are rendered immune from judicial review by section 211(a). That case involved a challenge to the constitutionality of veterans' benefits legislation. Emphasizing that the language of the statute did not present an explicit bar to the judicial review of such challenges, this Court examined both the legislative history and the purposes of the statute in order to determine the scope of section 211(a). This Court concluded that a decision arises under a law administered by the VA only if it "is made by the Administrator in the interpretation or application of a particular provision of the statute to a particular set of facts," strongly suggesting that section 211(a) applies only in the case of individual benefits adjudications. This Court also concluded that section 211(a) restricted review only of those decisions of law or fact arising in the VA's administration of a statute providing for veterans' benefits. *Id.*

Following *Johnson v. Robison*, several courts of appeals applied this Court's analysis of section 211(a) to authorize judicial review of the validity of VA regulations and policies. In *Wayne State v. Cleland*, 590 F.2d 627 (6th Cir. 1978), the Sixth Circuit considered a claim by a university and a class of veteran students that certain VA regulations governing educational benefits had been promulgated without statutory authority. The Sixth Circuit relied closely on this Court's rationale in *Johnson v. Robison* in finding that section 211(a) had only limited preclusive effect. The court observed that suits challenging the authority of the VA to promulgate regulations would neither involve the courts in complex and technical VA policy issues nor create suits requesting "federal courts to second guess the Administrator on the merits of particular claims for benefits or the termination of such benefits." 590 F.2d at 631. The Sixth Cir-

cuit reasoned that to construe section 211(a) broadly would be to find that Congress had intended to allow the VA to define the limits of its own authority. The court refused to endorse such a construction, which it believed would raise serious doubts about the constitutionality of section 211(a). *Id.* at 632.

Faced with suits challenging the same or similar educational benefit regulations, three other circuit courts adopted the reasoning of *Wayne State*. The Eighth, Ninth and Fourth Circuits concluded that section 211(a) was designed to preclude judicial review of VA decisions on individual benefit claims but not to bar judicial review of regulations promulgated by the VA. See *Merged Area X (Education) v. Cleland*, 604 F.2d 1075 (8th Cir. 1979); *Evergreen State College v. Cleland*, 621 F.2d 1002 (9th Cir. 1980); *University of Maryland v. Cleland*, 621 F.2d 98, 101 (4th Cir. 1980).

This consensus regarding the scope of section 211(a) was broken by the decision of the District of Columbia Circuit in *Gott v. Walters*, 756 F.2d 902 (D.C. Cir.), *vacated and reh'g granted*, 791 F.2d 172 (D.C. Cir.) (*en banc*), *remanded with instructions to dismiss as moot*, 791 F.2d 172 (D.C. Cir. 1985) (*en banc*), in which that court ruled that section 211(a) *expressly* precludes judicial review of the VA's regulations and their promulgation.<sup>4</sup> Although the *Gott* decision was later vacated, its reasoning was adopted by the Federal Circuit in *Roberts*

<sup>4</sup> The district court in *Gott* had held that section 211(a) did not bar review of the VA's promulgation of rules and policies, and the litigation before the Court of Appeals focused on the merits of the case. A sharply divided panel of the District of Columbia Circuit, however, held over a strong dissent that virtually every action or determination of the VA was immune from judicial review. The *Gott* plaintiffs sought rehearing of the jurisdictional issue, and the court vacated the panel's decision and agreed to rehear the case *en banc*. Prior to rehearing, however, the case was settled, with the VA agreeing to grant substantial relief on the merits to the plaintiff veterans, and the *en banc* court dismissed the appeal as moot.

*v. Walters*, 792 F.2d 1100 (Fed. Cir. 1986) (constitutional challenges the sole exception to the preclusive effect of section 211(a)).

Most recently, the case of petitioner Traynor presented the Second Circuit with the question whether section 211(a) precludes judicial review of VA regulations for compliance with other federal statutes. The Second Circuit adopted the broadest possible reading of section 211(a) and determined that the statute precludes review of VA regulations and policies, even in the face of claims that they contravene clear requirements of federal law. The court was led to this erroneous conclusion by its assumption that Traynor's allegations constituted no more than a challenge to the Administrator's denial of his benefits claim.<sup>5</sup> In fact, however, Traynor did not challenge the application of the alcoholism policy to the particular facts of his case. Instead, he asserted a broad-based cause of action seeking a declaration that the alcoholism policy violated both the governing statute and the Constitution. The *Traynor* court's failure accurately to evaluate the procedural posture of the case caused it to deny review of the VA's alleged *ultra vires* acts.

Following upon the narrow reading given section 211(a) in the Fourth, Sixth, Eighth and Ninth Circuits, the *Traynor* line of cases has raised a clear and pressing question as to the scope of section 211(a). No disagreements exist among these courts as to the effect of section 211(a) on individual benefits determinations. Where the veteran challenges the factual findings of the Admin-

<sup>5</sup> The *Wayne State* line of cases cannot properly be distinguished from *Traynor* on the ground that they involved "broad challenges to the validity of a VA regulation brought by educational institutions interested in the overall administration of the VA educational benefits program." *Traynor*, 791 F.2d at 230. Both the *Wayne State* and *Merged Area X* cases had individual veterans as well as university plaintiffs challenging the VA regulations at issue. Moreover, section 211(a) clearly provides no authority for distinguishing among plaintiffs eligible to challenge VA actions.

istrator as to the veterans' entitlement to benefits, the courts of appeals agree that judicial review is barred. Similarly, if the veteran challenges the Administrator's interpretation of a statute or regulation as applied to an individual benefits determination, the courts of appeals also agree that there is no judicial review as to that "decision[ ] . . . of law." Also, in light of this Court's decision in *Johnson v. Robison*, the courts of appeals apparently agree that constitutional challenges to the VA's actions, regulations, and policies are subject to judicial review under section 211(a).

However, in clear conflict with the *Wayne State* line of cases, the *Traynor* line of cases would immunize every other act of the VA from judicial scrutiny. This expansive reading of section 211(a) is not authorized by the terms of the statute and is not supported by congressional intent or the policies underlying the statute. See Argument II, *infra*. Moreover, the *Traynor* analysis suffers from a critical failure to evaluate the procedural posture of challenges to VA actions and to consider the consequences if the VA is placed beyond any obligation to follow federal law. The superficial *Traynor* analysis of the scope of section 211(a) must therefore be rejected.

In resolving the conflict that now exists concerning the scope of 211(a), this Court should be guided by what the VA itself has repeatedly said in informing Congress that section 211(a) does not bar court review of challenges to VA regulations or other policies of broad application that are inconsistent with the Veterans' Benefits Law.<sup>6</sup> Accordingly, this Court should find that where it

<sup>6</sup> The VA has taken this position in every recent hearing concerning legislation to limit the present scope of section 211(a). In 1982, the statement of the VA's Acting Administrator was that:

We continue to believe that there should be access to the courts for challenges to the constitutionality of veterans' benefits legislation, regulations, and procedures. . . . In addition, we are cognizant of an emerging trend in several Federal district



is alleged that the VA has exceeded its authority in implementing the governing statute or has failed to implement that statute, court jurisdiction exists to review those allegations. Such litigation would not encompass review of VA decisions on individual benefits claims. Similarly, this Court should find that section 211(a) does not bar challenges to the methods by which the VA promulgates its regulations and policies. Such familiar challenges asserting basic rights to notice and comment do not impinge upon the interests protected by section 211(a).

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courts and courts of appeals toward permitting judicial review of allegations that a regulation was promulgated in excess of the Administrator's authority or otherwise contrary to law. This growing body of case law would seem to provide a sufficient basis for review of substantive agency actions of broad binding application, without the need for new legislation.

*Veterans' Administration Adjudication Procedure and Judicial Review Act: Report of the Senate Committee on Veterans' Affairs to Accompany S.349, 97th Cong., 2d Sess. 83 (1982) (statement of Donald Curtis, Acting Administrator).*

In 1984, the VA took the same position during Congressional consideration of the Veterans' Dioxin and Radiation Exposure Compensation Standards Act of 1984:

I continue to believe that VA regulations should be, and are, reviewable in the Federal courts. This principle was further explained by the Acting General Counsel last summer, when he indicated to the Committee that "legislation, regulations and procedures" are judicially reviewable, as are "substantive Agency actions of broad, binding application."

Section 211(a) has been properly limited by the courts so that it does not protect every decision, policy, or action of the VA from judicial scrutiny. Those Agency rules and procedures of broad and binding application which affect the rights of a number of claimants to VA benefits are not protected by Section 211(a). The way the VA processes and decides an individual benefit claim is clearly beyond the reach of the Federal courts, however.

Letter from Robert Nimmo, VA Administrator, to Sen. Cranston, Chairman of the Senate Veterans' Affairs Committee (March 29, 1982), reprinted in 130 Cong. Rec. S6160 (daily ed. May 22, 1984).

Finally, this Court should find that section 211(a) erects no jurisdictional bar to claims that VA regulations and policies contravene federal statutes other than those that the VA is delegated to administer.

This functional analysis of the scope of section 211(a) is neither abstract nor advisory. The need for a precise evaluation of the scope of the statute is presented directly by the cases now before this Court. The need for a clear demarcation of the rights of veterans to judicial review is also illustrated by other pending challenges to VA actions.

For example, Vietnam Veterans and a number of individual plaintiffs have brought suit in another important case challenging the validity of VA regulations. The class in *Nehmer v. United States Veterans' Administration*, No. CV-86-6160 (N.D. Cal. filed Oct. 31, 1986), is challenging the actions of the Veterans' Administration in the establishment and implementation of an entire program mandated by Congress related to the Agent Orange controversy, the Veterans' Dioxin and Radiation Exposure Compensation Standards Act of 1984, 38 U.S.C. § 354 (a). In essence, plaintiffs contend that the VA has contravened the purpose of the Act by failing to implement its key provisions, threatening to deprive thousands of veterans exposed to Agent Orange during service in Vietnam of the benefits granted to them by the Act. This challenge to the VA's actions includes allegations that the VA violated express provisions of section 354(a), thereby acting beyond its statutory authority,<sup>7</sup> as well as the due

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<sup>7</sup> The *Nehmer* plaintiffs have alleged that the VA violated express provisions of the Act and exceeded its statutory authority by: (1) failing to adopt guidelines for evaluating the scientific evidence relating to dioxin; (2) failing to make evaluations of the findings of scientific studies relating to dioxin exposure; (3) failing to provide administrative support services and fiscal support for the Committee charged with reviewing the scientific evidence; (4) failing to ensure that veterans were provided with the benefit of reasonable doubt concerning whether a particular disease was associated with the period of service.



process clause of the Constitution.<sup>8</sup> Under the broad reading of section 211(a) reflected in *Traynor*, the non-constitutional regulatory challenges of the *Nehmer* plaintiffs would be precluded from judicial review.

The implication of the *Traynor* decision—that the VA is uniquely free to ignore the mandate of any federal statute with impunity and without the restraint of judicial review—is irrational and unjust. It is essential that this Court address the implications of *Traynor* and in doing so provide the lower courts with guidance on the scope of section 211(a).

## II. SECTION 211(a) OF THE VETERANS' BENEFITS LAW DOES NOT PRECLUDE JUDICIAL REVIEW OF THE VALIDITY OF REGULATIONS OR POLICIES

Any consideration of whether final agency action is subject to judicial review must begin with the strong presumption that Congress intends such review. Judicial review will not be precluded unless there is "persuasive reason to believe that such was the purpose of Congress." *Bowen v. Michigan Academy of Family Physicians*, 106 S. Ct. 2133, 2135 (1986), quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1976).<sup>9</sup> The burden of establishing this "persuasive reason" rests with the party seeking to limit judicial review. Clear and convincing evidence of an intent to bar review must

<sup>8</sup> The Veterans' Administration has moved to stay the *Nehmer* proceedings pending a decision by this Court on the instant cases. That motion is currently pending before the United States District Court for the Northern District of California.

<sup>9</sup> This jurisdictional principle is established by a long line of this Court's decisions. See, e.g., *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971); *Tooahnippah v. Hickel*, 397 U.S. 598, 606 (1970); *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 156-157 (1970); *Barlow v. Collins*, 397 U.S. 159, 166 (1970); *Rusk v. Cort*, 369 U.S. 367, 379-80 (1962).

be presented before the courts may limit review. Where substantial doubt exists concerning congressional intent, the presumption favoring review is controlling. *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 778 (1985); *Block v. Community Nutrition Institute*, 467 U.S. 340, 349 (1984).

While not irrebuttable, the presumption in favor of judicial review may be overcome only by specific statutory language barring review, by specific legislative history that is a reliable indicator of congressional intent or by congressional intent that is fairly discernible in the detail of the legislative scheme. *Block*, 467 U.S. at 349, 351. No convincing evidence exists to overcome the presumption in the case of section 211(a). Neither the language of the statute, the legislative history nor the purpose of section 211(a) provides any indication of a congressional intent to preclude judicial review of the validity of VA regulations or policies.

### A. The Language of Section 211(a) Evidences Its Limited Preclusive Effect

Any attempt to read section 211(a) as broad enough to bar judicial review of all VA actions runs counter to the language of the statute. Section 211(a) prohibits judicial review of "decisions . . . on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans. . . ." 38 U.S.C. § 211(a). The statutory provision does not expressly preclude judicial review of the validity of VA regulations or policies. On the contrary, the use of the word "decisions" indicates that Congress intended to bar judicial review only of individual benefits determinations.<sup>10</sup>

Such a reading of section 211(a) is consistent with this Court's decision in *Johnson v. Robison*, 415 U.S. 361 (1974). In *Johnson v. Robison*, this Court identified two elements of section 211(a) that require the provision to be construed as having limited preclusive effect. First,

the Court stated that a decision "arises under any law administered by the VA" within the meaning of section 211(a) only if it "is made by the Administrator in the interpretation or application of a particular provision of the statute to a particular set of facts." 415 U.S. at 367. In other words, the language of section 211(a) should be interpreted to preclude the review of fact-based determinations made by the VA concerning individual benefits claims.

The fundamental flaw in the decision of the *Traynor* majority, as discussed above, was its assumption that petitioner Traynor's challenge to the alcoholism policy constituted a challenge to the VA's decision on his particular benefits claim. But when the VA promulgated its alcoholism policy, which was the sole focus of Traynor's court challenge, it was not applying "a particular provision of the statute to a particular set of facts."

The second restriction on the scope of section 211(a) established in *Johnson v. Robison* is that the statute only precludes judicial review of laws administered by the VA. 415 U.S. at 367. This second limitation is the basis for the reasoning of the dissent in the *Traynor* case. Judge Kearsce reasoned that petitioner Traynor's challenge to the VA policy on alcoholism raised a question not under a law administered by the VA but under the Rehabilitation Act. 791 F.2d at 232-233. While this reasoning does provide a basis for jurisdiction in the cases now before this Court, there is no need for the Court to restrict its holding to the second prong of the *Johnson v. Robison* analysis. *Johnson v. Robison* clearly

<sup>10</sup> In the context of the Veterans' Benefits Law, Congress has clearly differentiated between "decisions" issued by the VA and "regulations" adopted by the agency. Section 4004 of the Veterans' Benefits Law defines the authority of the Board of Veterans Appeals ("BVA") to make "decisions" concerning all veterans' appeals (38 U.S.C. § 4004(a)) and requires BVA in making such decisions to adhere to the "regulations" of the VA (38 U.S.C. § 4004(c)).

suggested that section 211(a) applies only to VA decisions involving individual benefits claims. This case provides an appropriate vehicle for confirming this aspect of *Johnson v. Robison* in order to dispel any uncertainty as to the scope of section 211(a).

#### B. The Legislative History of Section 211(a) Indicates Its Limited Preclusive Effect

There is no specific legislative history that manifests congressional intent to preclude review of the validity of VA regulations or policies. Indeed, the limited legislative history that does exist demonstrates that Congress intended that the preclusive effect of section 211(a) be limited to individual benefits determinations. This conclusion stems from an examination of the statutory precursors of section 211(a). While the relevant wording of the "limited review" provision has been changed two times since its original enactment, those changes were not meant to alter the scope of the provision as originally enacted. *Johnson v. Robison*, 415 U.S. at 368-374.

A "limited review" clause was included in section 5 of the statute that created the Veterans' Administration, the Economy Act of 1933, Pub. L. No. 73-2, § 5, 48 Stat. 8, 9 (1933). This provision precluded judicial review of "[a]ll decisions rendered by the Administrator under the provisions of [the Act] or the regulations issued pursuant thereto." This Court's interpretation of section 5 of the Economy Act was that it

concerns *only grants* to veterans and their dependents—pensions, compensation, allowances, and special privileges, all of which are gratuities. The purpose of the section appears to have been to remove the possibility of judicial review in *that class of cases*. . . .

*Lynch v. United States*, 292 U.S. 571, 587 (1934) (emphasis added). This reading of section 5 suggests that



Congress intended to limit review only of decisions on individual *benefits* claims. While the statute contemplated that the VA would apply its regulations in reaching such non-reviewable decisions, it certainly did not indicate that such regulations themselves were immune from judicial review.

In 1940, the language of the "limited review" provision was changed significantly to clarify the original intent of the jurisdictional restriction. The 1940 language barred review of "decisions of the Administrator" on questions of law or fact concerning "*a claim* for benefits or payments." The use of the term "decisions" together with the word "claim" strongly suggests that only decisions on individual claims for benefits were to be barred from judicial review. In a complementary provision of the 1940 Act, Congress set forth the jurisdiction of the Board of Veterans Appeals ("BVA"). That provision gave the BVA jurisdiction over "all questions on claims involving benefits under the laws administered" by the VA. 38 U.S.C. § 4004(a). These parallel provisions allocated appellate functions between the BVA and the courts. The BVA was given jurisdiction over all benefits claims decided in the first instance by VA regional offices—precisely the matters that, according to the "limited review" provision, could not be reviewed by the courts. This grant of jurisdiction to the BVA clearly did not extend to the review of VA regulations or policies. See 38 U.S.C. § 4004(c).

In 1970, the "limited review" provision was amended to its present form.<sup>11</sup> The legislative history of the 1970 amendment clearly indicates that this final alteration in the language of section 211(a) had one narrow purpose, to overrule a series of decisions by the Court of

<sup>11</sup> The changes to the statute made in 1957 left untouched the relevant language of the 1940 amendment.

Appeals for the District of Columbia Circuit.<sup>12</sup> In those decisions,<sup>13</sup> the D.C. Circuit had determined that the phrase "a claim" encompassed only an original application for benefits. As a result the court held that subsequent action by the Administrator, such as a reduction or termination of benefits, was not an adjudication of a claim and hence was not precluded from review by section 211(a). In order to guarantee that *all* adjudications concerning individual benefits determinations remained immune from review, Congress eliminated the words "a claim" and substituted the present language of section 211(a). Congress did not intend to change the meaning of section 211(a) except to overrule the D.C. Circuit definition of "a claim." *Johnson v. Robison*, 415 U.S. at 371-73.

The statutory precursors to section 211(a) were intended solely to limit the judicial reviewability of individual benefits determinations. None of the "limited review" provisions expressly or implicitly included VA regulations or policies within their scope. Thus, the legislative history contains no evidence—let alone a clear and convincing indication—of congressional intent broadly to restrict judicial review.

In addition, since the enactment of section 211(a) in its present form, Congress has relied on an interpretation of the statute which allows judicial review of the validity of VA regulations.<sup>14</sup> Either the House or the

<sup>12</sup> See H.R. Rep. No. 1166, 91st Cong., 2d Sess. 8-11, 19-24 (1970).

<sup>13</sup> *Tracy v. Gleason*, 379 F.2d 469 (D.C. Cir. 1967); *Thompson v. Gleason*, 317 F.2d 901 (D.C. Cir. 1962); *Wellman v. Whittier*, 259 F.2d 163 (D.C. Cir. 1958).

<sup>14</sup> The post-enactment Congressional consideration of section 211(a) is instructive, though not controlling, as to the intent of the enacting Congress. See *Universities Research Association v. Couto*, 450 U.S. 754, 778 (1981). The views of the later Congresses can indicate that the legislative body shared and acted upon a consensus regarding the meaning of a particular statute. See, e.g., *Grove City v. Bell*, 465 U.S. 555, 567-568 (1984); *Bell v. New Jersey*, 461 U.S.



Senate considered the scope of section 211(a) in each one of the last five Congresses.<sup>15</sup> Each congressional review of the "limited review" provision involved consideration of whether section 211(a) should be amended to authorize review of VA decisions concerning individual benefits claims. Throughout these hearings representatives of the Veterans' Administration have testified that section 211(a) does not preclude judicial review of the validity of regulations.<sup>16</sup> According to the VA's latest pronouncement, the VA "regards its regulations and substantive agency actions of broad application to be subject to ju-

773, 784-87 (1983); *Andrus v. Shell Oil Co.*, 446 U.S. 657, 668-72 (1980).

<sup>15</sup> See, e.g., *H.R. 585 and Other Bills Relating to Judicial Review of Veterans' Claims: Hearings Before the Committee on Veterans' Affairs, House of Representatives*, 99th Cong., 2d Sess.; *Veterans' Administration Adjudication Procedure and Judicial Review Act and the VA's Fiscal Year 1984 Major Construction Project Proposals: Hearings on S. 636 and Related Bills Before the Senate Veterans' Committee*, 98th Cong., 1st Sess.; *Judicial Review of Veterans' Claims: Hearings Before the House Veterans' Affairs Subcommittee on Oversight and Investigations*, 98th Cong., 1st Sess.; *Judicial Review of Veterans' Claims: Hearings Before the House Veterans' Affairs Subcommittee on Special Investigations*, 96th Cong., 2d Sess.; *Veterans' Administration Adjudication Procedure and Judicial Review Act: Hearings Before the Senate Veterans' Affairs Committee*, 97th Cong., 1st Sess.; *Veterans' Administration Adjudication Procedures and Judicial Review Act: Hearings Before the Committee on Veterans' Affairs, United States Senate*, 96th Cong., 1st Sess.; *VA Administrative Procedure and Judicial Review Act: Hearings before the Committee on Veterans' Affairs, United States Senate*, 95th Cong., 1st Sess.

<sup>16</sup> From 1952 until the most recent hearings, the VA has testified that section 211(a) does not prohibit judicial review of all VA determinations. See, e.g., *Hearings on H.R. 360, 478, 2442 and 677 Before a Subcommittee of the House Committee on Veterans' Affairs*, 82d Cong., 2d Sess. 1962-63 (1952); *Veterans' Administration Procedure and Judicial Review Act: Report of the Senate Committee on Veterans' Affairs to Accompany S. 349*, 97th Cong. 2d Sess. 83 (1982) (statement of Donald Curtis, Acting Administrator).

dicial review. Accordingly, there are many instances in which section 211(a) . . . does not preclude judicial review at least with respect to these questions of law."<sup>17</sup>

Congress apparently has accepted this VA interpretation as persuasive as to the scope of section 211(a). Accordingly, the representations of the Veterans' Administration concerning the scope of section 211(a) must be accorded great weight. See *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 788 (1985).

Similarly, Congress has acquiesced, from 1978 until today, in courts of appeals decisions such as *Wayne State* allowing judicial review of the validity of regulations. Such acquiescence suggests that these decisions were in keeping with congressional intent regarding the scope of section 211(a). Congress clearly would have been capable of responding to these judicial decisions if it believed that they thwarted its intentions regarding judicial review of VA determinations. In fact, it did so in 1970 because of its dissatisfaction with the District of Columbia Circuit's interpretation of the 1940 version of section 211(a), but it has not done so in the nine years that have elapsed since *Wayne State*.

### C. The Purposes Served by Section 211(a) Require Only a Limited Preclusive Effect

The purposes served by precluding judicial review of VA decisions on individual benefits claims do not come into play when the validity of VA regulations or policies is at issue. In *Johnson v. Robison* this Court determined that Congress enacted section 211(a) to serve "two primary purposes: (1) to insure that veterans' benefits claims will not burden the courts and the Veterans' Administration with expensive and time consuming litigation; and (2) to insure that technical and complex determinations and applications of Veteran's Administration policy connected with veterans' benefits decisions will be

<sup>17</sup> 1986 House Hearings, Vol. II at 328.

adequately and uniformly made." 415 U.S. at 370. Judicial review of the validity of VA regulations and policies would not undermine either purpose. First, judicial review of such cases would not overload the courts. Permitting review of a statutory or administrative standard would not create a flood of litigation because the validity of a standard can be readily established, typically in a single litigation. *Bowen v. Michigan Academy*, 106 S. Ct. at 2141 n.11.

The nature of the regulatory challenge presented by petitioners Traynor and McKelvey is illustrative. Petitioners contend that the VA, like every other executive agency, must comply with the Rehabilitation Act of 1973, as amended. Should petitioners' challenge succeed in this Court, the VA's alcoholism policy would be invalidated. As a result threshold questions that arise in cases relating to educational benefits as well as pension and other benefits currently affected by the policy would be resolved without further resort to the courts.

The federal courts are well equipped to consider and summarily reject cases which are clothed as regulatory challenges but actually present appeals of individual benefit determinations. The courts have done just this in cases alleging constitutional challenges to veterans' benefits legislation. See *Rosen v. Walters*, 719 F.2d 1422, 1423 (9th Cir. 1983); *Pappanikolaou v. Adm. of Veterans' Administration*, 762 F.2d 8, 9 (2d Cir. 1985).

Past experience also suggests that a holding that VA regulations and policies are subject to review will not burden the courts.<sup>18</sup> From 1978, when the Sixth Circuit

<sup>18</sup> This Court has addressed a similar concern in *Bowen v. Michigan Academy*. At issue in *Bowen* was whether the method by which Medicare benefits are determined—as opposed to the actual calculation of benefits—was subject to judicial review. The Court noted that it had not observed a flood of litigation in the past and doubted that there would be a future inundation. 106 S. Ct. at 2141 n.11.

decided in *Wayne State v. Cleland* that VA regulations were reviewable, until 1985 when the first cases reaching a contrary result were decided, only a handful of cases challenging VA regulations or policies has reached the courts of appeals. Congress achieved its goal of limiting the burden on the courts by denying review of VA decisions on individual benefits claims.

Second, allowing judicial review of the validity of regulations would not interfere with the uniformity of VA decision making concerning technical and complex determinations. In articulating this second purpose for section 211(a), this Court referred in *Johnson v. Robison* to a 1952 opinion of the VA Administrator that in the *adjudication* of compensation and pension claims a wide variety of medical, legal and other technical questions arise which require use of experts and which are not susceptible of legal standardization. 415 U.S. at 370 n.12. All of the technical and complex determinations listed by the Administrator in that letter, such as those involving length of service, origin of disability and rating schedules, arise in individual benefits claims and relate to factual findings which must be made by the VA.

In contrast, petitioners in this case do not request the Court to review any technical factual questions concerning their individual entitlement to benefits. Rather, petitioners request the Court to review the legality of VA action by determining whether a VA-promulgated policy violates another federal statute, the Rehabilitation Act. To the extent that the courts are required to assess technical or complex issues in passing on the validity of VA regulations or policies, such tasks are not beyond their competence or experience. Where necessary the courts may appropriately rely on the technical expertise of the VA by adopting a deferential standard of review that acknowledges the agency's expertise.

\* \* \* \*

There is no clear and convincing evidence to overcome the presumption that judicial review of Veterans' Admin-

istration regulations and policies is available under section 211(a). On the contrary, the language of the statute, its legislative history, and the purposes of the provision as identified by this Court all suggest that section 211(a) bars review only of VA decisions on individual claims for veterans benefits. To construe section 211(a) more broadly, as the Second Circuit did in *Traynor*, would be to contravene this Court's rulings concerning the availability of judicial review and to countenance the dangerous and irrational proposition that the Veterans' Administration is free to disregard the will of Congress.

### CONCLUSION

For all of the foregoing reasons, Vietnam Veterans of America respectfully requests that this Court confirm that section 211(a) of the Veterans' Benefit Law does not preclude the judicial review of the validity of VA regulations and policies of broad application.

Respectfully submitted,

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